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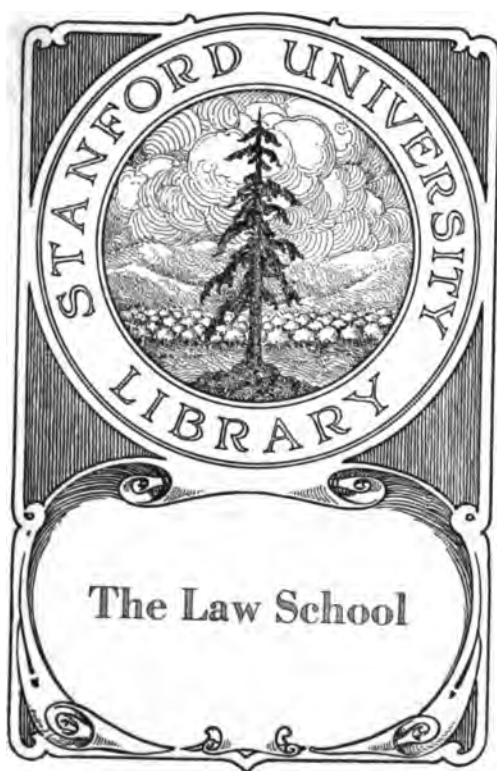
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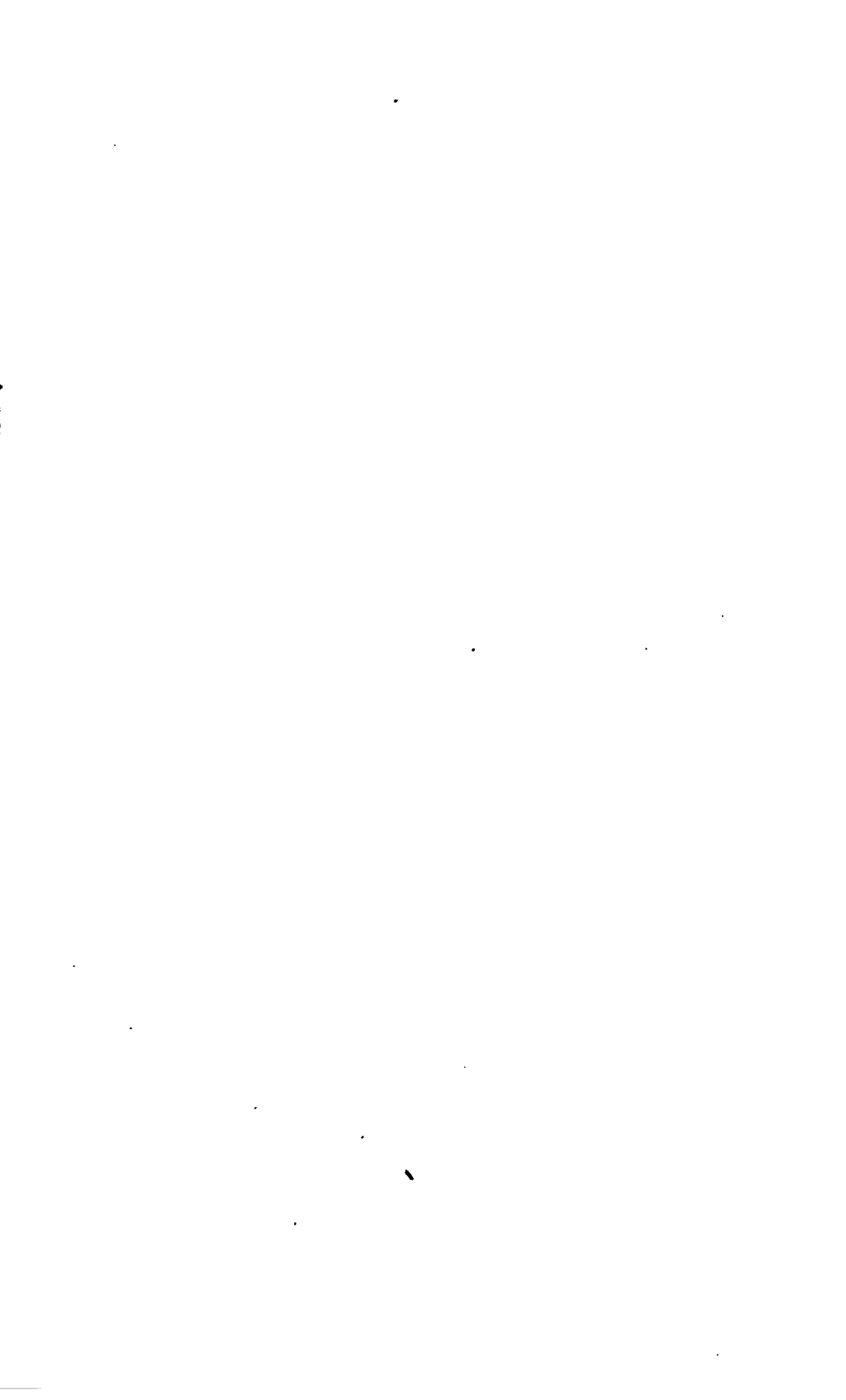
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
English Courts of Common Law.

Gillies

HERETOFORE CONDENSED BY
HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT.

Now Reprinted in Full.

VOL. IX.

CONTAINING

The Cases in the Court of King's Bench, in Trinity, Michaelmas, Hilary, and Easter Terms, 1823, 1824; and in the Court of Common Pleas, and other Courts, from Easter Term, 1824, to Hilary Term, 1825.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1870.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL,

OF LINCOLN'S INN,

AND

CRESSWELL CRESSWELL,

OF THE INNER TEMPLE, ESQRS., BARRISTERS AT LAW.

VOL. II.

CONTAINING THE CASES OF TRINITY, MICHAELMAS, HILARY, AND
EASTER TERMS, 4 & 5 GEO. IV., 1823, 1824.

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1870.

JUDGES
OF
THE COURT OF KING'S BENCH
DURING THE PERIOD OF THESE REPORTS.

Sir CHARLES ABBOTT, Knt., C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir WILLIAM DRAPER BEST, Knt.
Sir JOSEPH LITTLEDALE, Knt.

ATTORNEYS-GENERAL
Sir ROBERT GIFFORD, Knt.
Sir JOHN SINGLETON COPLEY, Knt.

SOLICITORS-GENERAL.
Sir JOHN SINGLETON COPLEY, Knt.
Sir CHARLES WETHERALL, Knt.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH

Trinity Term,

IN THE FOURTH YEAR OF THE REIGN OF GEORGE IV.

CHEEK v. JEFFERIES.

The memorial of an annuity must contain the Christian name of the subscribing witness to the securities. The initial of the Christian name is not sufficient.

A *KULE nisi* had been obtained in this case, for cancelling and vacating the bond and warrant of attorney and judgment for securing an annuity, and the execution issued thereon, on the ground that the memorial did not contain the Christian name of one of the subscribing witnesses to the securities. In the memorial the subscribing witness was described as H. Fleming, his name being Harris Fleming. The Court, after hearing

Maryat, in support of the rule, and *Denman*, contra, were clearly of opinion, that the 53 G. 3, c. 141, s. 2, which required that the memorial should contain *2] the *names of all the parties and of all the witnesses to the deed, had not been complied with, the initial not being a name, and not affording that facility of finding the subscribing witness which it was the intention of the legislature to secure.

Rule absolute for setting aside the warrant of attorney,
and judgment and execution issued thereon.

DRAPER v. GARRATT and Another.

Where a declaration against a sheriff for taking insufficient pledges in a replevin bond, stated that the party replevying levied his plaint "at the next county court, to wit, at the county court, holden on, &c. before A., B., C., and D., suitors of the court:" which plaint was afterwards removed by *re. fa. lo.*, and by that record it appeared that the plaint was levied at a court holden before E., F., G., H.: *Held*, that the variance was immaterial, for that it was unnecessary to state or prove the names of the suitors, and that they might be rejected as surplusage.

CASE against the defendants, sheriff of Middlesex, for taking insufficient sureties in a replevin bond. The declaration alleged that plaintiff distrained the goods of R. Field for rent arrear; that the defendants made deliverance of the said goods to Field; and that "at the next county court for the said county of Middlesex, to wit, at the county court of the said sheriff, holden in and for the county, at, &c., on, &c., before W. W., A. O., E. C., and P. D., then suitors of the said court," Field appeared and levied his plaint against the plaintiff, which plaint was afterwards, at the instance of the plaintiff, removed by *re. fa. lo.* into the court of our lord the king, before the king himself, at Westminster.

The declaration then set out the proceedings in that suit, and that it was considered and adjudged that Field and his pledges should be in mercy, and that plaintiff should have a return of the goods, &c.; and then averred that the sureties taken by the sheriff were insufficient; and that no part of the goods had been returned, nor any part of the rent in arrear paid. Plea, not guilty. At the trial, before ABBOTT, C. J., at the Middlesex sittings after last Easter term, the plaintiff gave the record of the *re. fa. lo.* in evidence, [*3 by which it appeared that the plaint was levied at a court holden before A., B., C., and D., and not before W., W., A. O., E. C., and P. D., as stated in the declaration; but it was recorded before them by virtue of the writ of *re. fa. lo.* *Scarlett*, for the defendants, contended that this was a fatal variance. The lord chief justice reserved the point, and the plaintiff obtained a verdict.

Scarlett now moved to enter a nonsuit. The gist of the plaintiff's action is, that the sheriff took insufficient sureties; but, in order to recover, it is essential for him to show a title to proceed against the sureties. One step towards that is the production of the record of the plaint originally levied in the county court. Now the record produced, being different from that described in the declaration, cannot be taken to be the true record. Suppose another action were brought for this same neglect, and the record were in that properly described, the defendants could not plead the former recovery; for they could not aver that the record set out in that case and in this is the same. Nor can the allegation be rejected as surplusage. There is a difference between impertinent and unnecessary allegations. The former are of matter which need not be either alleged or proved; the latter are of matter which must be proved, but need not be alleged in pleading. If, however unnecessary, allegations are made, they must be made correctly. *Bristow v. Wright*, 2 Doug. 665; *Turner v. Eyles*, 3 B. & P. 456. Suppose, in this *very declaration, where it is alleged that the plaint was removed into the court of our lord the king, the words [*4 "of the bench" had been added, surely they could not have been rejected as surplusage; and yet there appears to be no reason for not rejecting those words, which is not equally applicable to the matter now before the court.

ABBOTT, C. J. I quite agree with the distinction that has been taken between what is unnecessary to be alleged, and what is altogether immaterial. Applying that distinction to the present case, I am satisfied that we ought not to listen to this application. It was necessary to prove that at the next county court after the replevin Field levied his plaint; but it was perfectly unnecessary, to prove who were the suitors before whom that court was held. That allegation was, therefore, immaterial, and might have been left out of the declaration, and then it would have run thus, "And the plaintiff further saith, that at the next county court for the said county of Middlesex, R. Field appeared and levied his plaint;" that is the material part of the allegation, and that was proved as alleged. There are several cases upon this subject, but I shall only refer to one of them, which is decisive on this point, *Bushey v. Watson*, 2 Bl. 1050. That was an action on the case for a malicious prosecution; the declaration stated that at the general quarter sessions of the peace for Middlesex, on a certain day, the defendant caused the plaintiff to be indicted, and at the general quarter sessions, holden by adjournment on a subsequent day, he was acquitted. The plaintiff gave in evidence the record of the court, *which stated the indictment to have been found at the general sessions, omitting the word [*5 *quarter*. Upon this variance the plaintiff was nonsuited. A motion was afterwards made for a new trial, and, after time taken to deliberate, the rule was made absolute, and the judgment of the Court was delivered by DE GRAY, C. J. After adverting to the sessions being held eight times a-year in Middlesex, and that four are called general *quarter* sessions, and the other four general sessions, he observes, that both have an equal jurisdiction to take and to try indictments; and then proceeds thus, "Now it is held in *Barns v. Constantine*, Cro. Jac.

32; Yelv. 46, S. C., (and we all concur in the same opinion,) that where the declaration sets out a court that has authority to proceed, it need not exactly copy the style set out in the record." In this case the declaration does set out a court that had authority to proceed, viz., the next county court; it is unnecessary to state or prove before what suitors it was held. Besides, the allegation is under a *scilicet*, which has a very healing operation. For these reasons, I think that the variance insisted upon was immaterial, and that the allegation was in substance proved; the rule prayed for must, therefore, be refused.

BAYLEY, J. The whole of the allegation in question was under a *scilicet*, and, if it was substantially proved, that is sufficient. Now the material part of the allegation is, that at the next county court the plaintiff was levied; and that was proved. Besides the case referred to by my lord chief justice, there are *6] two more modern cases, in which the Court have put questions of this nature upon a reasonable and beneficial ground; and, as far as they can, have prevented parties from being turned round on matters of form which have connection with the justice of the case. In *Purcell v. Macnamara*, 9 East, 157, which was an action for a malicious prosecution, the declaration stated that the plaintiff had been tried and acquitted on the morrow of the Holy Trinity; it appeared by the record, when produced, that the trial took place on Tuesday next after the end of Easter term, and that variance was held to be immaterial, because it was only necessary for the plaintiff to prove that he was acquitted before his action was commenced. The same principle was recognised and acted upon in *Phillips v. Shaw*, 4 B. & A. 435, where the declaration alleged that a judgment was recovered in Michaelmas term, whereas the record proved it to have been recovered in Hilary term. Upon these authorities, I think that the variance in this case was immaterial.

HOLROYD, J. I am of opinion that this rule must be refused, both upon principle and authority. The allegation in question was under a *scilicet*, and was proved in substance. The material part of it was, that Field levied his plaint at the next county court; that was proved as stated. It was quite immaterial before whom that court was held; and, therefore, although certain names were mentioned, the plaintiff, according to the general rule, was not bound to give any proof of that. Then as to authority, besides the cases already referred to, *Judge v. Morgan*, 13 East, 547, is expressly in point. That was an action for *7] a malicious arrest; and the declaration stated the judgment in the former suit to be, that the then plaintiffs and their pledges to prosecute should be in mercy. The record, when produced, had not the words, "and their pledges to prosecute;" but the Court held that those words might be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit. I am, therefore, of opinion that the names of the suitors may be rejected as surplusage in this case; and, if so, the variance is immaterial.

BEST, J., concurred.

Rule refused. (a)

(a) See *King v. Pippet*, 1 T. R. 235, where many authorities to the same effect are collected; and *Res v. Leafé*, 3 Camp. 139.

SARQUY and Another v. HOBSON.

Upon a policy of insurance on goods, the ship being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses: Held, that the underwriter was not answerable for this loss.

Assumpsit upon a policy of insurance on goods. The declaration alleged a loss by perils of the seas. Plea, general issue. At the trial before ABBOTT, C. J., at the sittings after term, a verdict was found for the plaintiffs, subject to the opinion of the Court, on the following case:

The plaintiffs, on the 12th May, 1817, effected a policy of insurance on West India produce in the ship *Pekin*, at and from Jacmel to the ship's port of discharge in Europe, without the Mediterranean and Baltic, with liberty to take in produce at the two contiguous ports of *Acquin and Aux Cayes, [*8 and to proceed to St. Iago, in the Island of Cuba, to finish her loading, and wait at or off any port in the channel for orders, or otherwise. The defendant subscribed the policy of assurance for 500*l*. The plaintiffs were interested to the full amount of the policy which was effected on their own account. On the 30th May, 1817, the ship *Pekin* was in safety in the Island of Cuba, and was there laden by the plaintiffs with West Indian produce, and thence set sail to her port of discharge in Europe. In the course of her voyage the *Pekin* was overtaken by a tempest, and sprung a leak, and made so much water that it became necessary for the preservation of the ship and cargo, to make for the nearest port, which turned out to be the Havannah; to which port the master, after consultation with the crew, proceeded. Upon the arrival of the *Pekin* at the Havannah it became necessary, for the purpose of ascertaining the cause of her leaking, to discharge the cargo, which was accordingly done; and surveys of the ship having been held, it was found expedient to remove the copper sheathing, in order to get at the leak, which was done; and the ship was repaired, new-caulked, and refitted for sea. Without these repairs the ship could not have proceeded on her voyage. The master of the *Pekin*, not having any other means of defraying the expenses occasioned by the repairs of the ship, sold part of the cargo, consisting of 716 bags and 18 barrels of coffee, belonging to the plaintiffs, and insured by the policy, and then lying in the warehouses at the Havannah, where they had been deposited when the ship was discharged. The expenses of the repairs of the ship were defrayed by the proceeds of the goods of the plaintiffs *so sold, and the ship then proceeded on her voyage, [*9 and arrived in safety at her port of discharge in Europe, where the remainder of her cargo was truly delivered. The defendant paid to the plaintiffs the sum claimed as his contribution in respect of his subscription of the policy, as for a general average loss on the plaintiffs' goods insured as aforesaid.

F. Pollock, for the plaintiffs. The plaintiffs are entitled to recover from the defendant, the underwriter on goods, the value of the goods sold for the purpose of repairing the ship. The repairs were rendered necessary by a peril of the sea. The assured were entitled to abandon when the ship put into a port out of the course of her voyage, for it was then likely that a total loss would ensue. It is sufficient for that purpose if the property be lost to them, although it remain entire. Now here, in consequence of a peril of the sea, the vessel, in distress, put into a port out of the course of her voyage: the goods insured from that moment became lost to the assured. It is true there has been no abandonment; and in consequence of the repairs having taken place, the loss upon the ship and the other parts of the cargo has become an average loss; but as to the goods in question, (which were sold for the purpose of repairing the ship,) they continue totally lost to the assured. If the underwriter be not liable, then there will be a peril, against which there will be no complete indemnity. The case of *Powell v. Gudgeon*, 5 M. & S. 431, is certainly in point; but that, for the reasons already given, cannot be supported.

Campbell, contrâ, was stopped by the Court.

**Per Curiam*. The case of *Powell v. Gudgeon* was properly decided, [*10 and is expressly in point. The loss of the goods in this case did not arise from any peril of the sea. The sale of the goods was rendered necessary, not by the peril of the sea, but by the inability of the captain to find money in any other way to repair the ship. The mere interruption of the voyage will not entitle the assured to abandon. There must have been a total loss at some period of the voyage.

Judgment for defendant.

UPSTONE and Another v. MARCHANT.

A bill was in fact drawn on the 21st day of December for 21*l.* payable two months after date ; but on the face of it purported to bear date on the 31st : it was held to require only a stamp of 2*s.*, which is imposed by 55 G. 3, c. 184, on bills for that sum, not exceeding two months after date. The word "date," as there used, meaning the period of payment expressed on the face of the bill.

DECLARATION by the endorsee against the acceptor of a bill of exchange, alleged to have been drawn on the 31st December, 1822. At the trial before ABBOTT, C. J., at the Middlesex sittings after last term, it appeared that the bill was in fact drawn on the 21st December, by one John Bucks, for 21*l.* 9*s.*, payable to his order two months after date, and endorsed by him to the plaintiffs, and accepted by the defendant ; and that it was delivered to the drawer. After it had been in his hands for a few minutes, the date of the bill was altered from the 21st to the 31st, at the request of the acceptor. The bill bore only a two-shilling stamp. It was objected at the trial, that as it was in fact drawn on the 21st, and the date of it altered to the 31st, it thereby became payable more than two months after the day on which it was drawn, and therefore that a *11] stamp of *2*s.* 6*d.* was required. The 55 G. 3, c. 184, schedule title *Bill of Exchange*, required a stamp of 2*s.* for bills for sums exceeding 20*l.* but under 30*l.*, not exceeding two months' date ; but when they exceed two months' date ; then a stamp of 2*s.* 6*d.* Here the bill had two months and ten days to run, from the 21st, the day on which it was drawn. The lord chief justice overruled the objection, and the plaintiff had a verdict. *Marryat* now moved for a new trial, and reurged the objection ; but the Court were clearly of opinion that the word "date" in the stamp act was intended to denote the period of payment on the face of the bill itself, and therefore refused the rule.

Rule refused. (a)

(a) The same point was decided at *Nisi Prius* in *Peacock v. Murrell*, 2 Stark. 558.

SCRACE, Gent., one, &c., v. WHITTINGTON, Gent., one, &c.

The attorney to a commission of bankrupt applied to the attorney of a mortgagee of premises belonging to the bankrupt to join in the sale of the mortgaged premises. The mortgagee having consented, her attorney requested the bankrupt's attorney to prepare, on the part of the mortgagee, requisitions to the commissioners of bankrupt to ascertain the amount of principal and interest due upon the mortgage, &c. The latter did so. The sale did not afterwards take effect. In an action brought by the bankrupt's attorney against the mortgagee's attorney for the amount due for the business done, it was held that the question was properly submitted to the jury, whether the credit was given to the defendant ; and the jury having found that it was, that the attorney was liable, although at the time when the business was done it was known to be done for the benefit of the mortgagee.

ASSUMPSIT for money due to the plaintiff, for work and labour, care and diligence, journeys and attendances, as an attorney and solicitor ; and for fees due *12] and of right payable to him, with the usual common counts. Plea, general issue. At the trial before ABBOTT, C. J., at the Middlesex sittings after last term, the following facts appeared in evidence : The plaintiff resided at Bath, and was solicitor to a commission of bankrupt issued against one Budget, of which Brine was assignee. The defendant resided at Chipping Sodbury, and was solicitor to Miss Smallcombe, who was a mortgagee of certain premises belonging to the bankrupt. The plaintiff applied to the defendant to advise his client to join in the sale of the mortgaged premises. The defendant afterwards informed the plaintiff that Miss Smallcombe had consented to join in requiring the sale of the estate. These conversations took place at Bath. The defendant being absent from home, requested the plaintiff to prepare the necessary papers on the part of Miss Smallcombe, and to expedite the sale. The latter did so ; and prepared requisitions from Miss Smallcombe to

the commissioners of bankrupt, to ascertain the amount of principal and interest due, and to order a sale of the bankrupt's effects, and also an affidavit of debt. Miss Smallcombe signed the requisition, but never had any communication with the plaintiff. The sale did not take effect, and the plaintiff claimed of the defendant the amount of his bill for business done on that occasion. It was contended, on the part of the defendant, that as there was no express undertaking on his part to be personally liable, and as it was known at the time when the business was done that Miss Smallcombe was the principal and the defendant only an agent, the latter was not responsible.

The lord chief justice was of opinion that this case formed an exception to the general rule, that agents are not liable upon a contract made by them in that character, *when the name of the principal is disclosed at the time of the contract, because it was the usual course of business between attorneys, [*13 when employed by one another, to look for payment to the attorney and not to his client. This was universally the practice between country attorneys and their agents in town; and he therefore told the jury, that if they thought upon the evidence that the plaintiff had given credit to the defendant for the business done, they should find a verdict for the plaintiff. The jury having found for the plaintiff,

Campbell now moved for a new trial, and contended that this case did not form any exception to the general rule. In *Hartop v. Jukes*, 2 M. & S. 438, and *Hart v. White*, Holt, N. P. C. 76, it was held, that an attorney who sued out a commission of bankrupt was not to be regarded as a principal, so as to make him liable to the messenger under the commission. *Burrell v. Jones*, 3 B. & A. 47, and *Iveson v. Conington*, 1 B. & C. 160, only establish, that an attorney may, by an express undertaking, make himself personally liable for the debt of his client. Here there was no express undertaking. The defendant, therefore, in this case, is not liable, although the plaintiff gave him credit for the business done, for he had no right to charge him with it.

Per Curiam. The question was properly left to the jury. It is a common practice for one attorney to do business for another. The attorney for whom the business is done generally makes the other some allowance out of the profits. The attorney who does the *business universally gives credit to the attorney who employs him, and not to the client for whose benefit it is [*14 done. An attorney doing business for another attorney may therefore give credit to that person to whom it is given in the usual course of such business, viz., to the attorney and not to the client. Here the jury have found that the credit was given to the defendant; and the law, therefore, will, from the usage of the business, raise an implied contract on the part of the latter to pay. If an attorney in such a case intends not to be personally responsible, it becomes his duty to give express notice that the business is to be done upon the credit of the client.

Rule refused.

JOHN MORGAN, Assignee of the Estate and Effects of JOHN JONES, a Bankrupt, v. WILLIAM PRYOR.

In an action by the assignees of a bankrupt who had obtained his certificate, and released the surplus of his estate, the bankrupt is a competent witness to prove the handwriting of the commissioners in order to identify the proceedings taken under the commission against him.

DECLARATION on a policy of insurance effected by Jones before his bankruptcy. Plea, general issue. At the trial before *ABBOTT, C. J.*, at the London sittings after last Trinity term, in order to establish the plaintiff's title to sue, the solicitor under the commission against Jones was called to produce and prove the proceedings before the commissioners; but it appearing that he was the petitioning creditor, he was rejected. The bankrupt, who had obtained his

certificate and released the surplus, was then called to identify the proceedings as those taken under his commission, and was asked to prove the handwriting
 *15] of the commissioners to the several documents. It was objected for the defendant, that the bankrupt was incompetent, as he came to support his commission. The lord chief justice overruled the objection, and the plaintiff obtained a verdict; but the defendant had leave to move to enter a nonsuit. In Michaelmas term a rule nisi for entering a nonsuit was granted, against which

The *Solicitor-General* and *Parke* now showed cause. The bankrupt was a competent witness to prove that for which he was called. He did not give evidence as to any fact necessary to support the commission, but merely identified the proceedings as those taken under a commission issued against him, and proved the handwriting of the commissioners, which was in fact unnecessary. It may be collected, from *Chapman v. Gardner*, 2 H. Bl. 279, and *Flower v. Herbert*, lb. n., that a bankrupt has been held incompetent to prove any fact in support of the commission, on the ground that the lord chancellor would, on application to him, supersede it, if the assignees in an action at law were unable to establish the bankruptcy; but it cannot be supposed that a commission would be superseded merely for a defect of proof as to the identity of the party named in the proceedings under the commission. It is even doubtful whether the proceedings were not made evidence by the mere production of them by the solicitor to the commission; for in *Rex v. Netherthong*, 2 M. & S. 337, a rated inhabitant of a respondent parish produced a certificate given by the
 *16] *appellant parish, and it was received without further evidence, as coming from the proper custody.

Scarlett and *F. Pollock*, contra. It is too late now to inquire into the principle upon which a bankrupt has been considered incompetent to support his commission. Whatever that principle may be, it is an invariable rule in practice, that a bankrupt cannot prove any fact necessary for that purpose. If the bankrupt in this case be held competent to prove the identity of the documents produced, he is in fact admitted as a witness to prove the whole bankruptcy; for through his testimony the proceedings were made evidence. Suppose a trader, during his absence from home, wrote a letter explaining the cause of it, why might he not, if admissible here, be admitted after bankruptcy to prove his handwriting to that letter? Or if a petitioning creditor's debt depended on the bankrupt's signature to an account, or a bill of exchange, why might he not be called to prove it? But it is quite clear, that in those cases his evidence could not be received. The 49 G. 3, c. 121, s. 10, only meant that the facts set forth in the proceedings should be considered as proved by them. The proceedings themselves must still be identified, and the bankrupt was no more competent to do that than to prove the several facts detailed in them. But it has been urged that the solicitor to the commission was the person in whose custody the proceedings would properly be, and that they were made evidence by the mere production of them by him. He however, being interested, was rejected on the *voir dire*; and therefore what he said was not evidence in the case. He
 *17] was not a witness in the *cause; and, consequently, there is nothing to show that they came from the proper custody.

ABBOTT, C. J. I am of opinion that this rule must be discharged. The motion was made on the ground that the bankrupt was improperly admitted at the trial as a witness to prove the identity of the proceedings under the commission against him. The bankrupt had obtained his certificate, and released the surplus of his estate; he therefore had not any immediate interest in the event of the suit, and for general purposes was a competent witness. But a rule has been long established, that a bankrupt cannot give evidence to prove any fact necessary to give validity to the commission. The 49 G. 3, c. 121,

s. 10, has dispensed with certain proofs which the common law required, and has provided that the proceedings of the commissioners shall be received as evidence of the petitioning creditor's debt, of the trading, and bankruptcy, unless notice be given of an intention to dispute those matters. The bankrupt was not in this case called to prove any of those facts, but merely the signature of the commissioners. The validity of the commission does not depend upon that signature, but upon the facts contained in the depositions to which the signature is subscribed. To prove that signature he certainly was competent, for the signature was not necessary to support the validity of the commission.

BAYLEY, J. I am of opinion that the bankrupt was a competent witness to prove that for which he was called, although incompetent to prove any fact necessary to support the commission. It has been said that it is *too [18 late now to inquire into the principle upon which a bankrupt has been held incompetent for that purpose. I think it is also too late to extend the rule beyond the letter of former decisions. It appears to me that the rule was founded upon the principle of interest in the bankrupt. Before the 49 G. 3, c. 121, was passed, the assignees of a bankrupt were bound to produce witnesses to prove the trading, the petitioning creditors debt, and the act of bankruptcy; and if they were unable to do that, it formed a ground upon which the lord chancellor might possibly supersede the commission. That would render the certificate inoperative; and therefore the bankrupt was considered interested in the support of the commission. But merely failing to prove the handwriting of the commissioners, is not a ground upon which the lord chancellor would think of superseding a commission. The principle upon which the former decisions proceeded does not then apply to this case, and the bankrupt was properly received as a witness.

HOLROYD, J. I think that if we held the bankrupt to be incompetent as a witness in this case, we should go a step further than any former decision. The general rule is, that a witness is competent unless interested in the event of the suit; and the criterion as to that is, whether the verdict can be given in evidence, either for or against him, in any other proceeding. Here the verdict would not be evidence, either for or against the bankrupt; he is not, therefore, within the general rule. But there are a few anomalous cases in which that criterion is not decisive as to the admissibility *of a witness; and accord- [19 ingly it has been held, that in an action by assignees, although the bankrupt may be a witness for other purposes, yet he cannot prove the act of bankruptcy, trading, or petitioning creditor's debt, because those circumstances are necessary, not only to the action, but to the commission itself. The case in 2 H. Bl. shows that the bankrupt was considered interested in proving each of those facts, lest proceedings should be had to supersede the commission; and for that reason he was considered as incompetent. Here the bankrupt was not called to prove those facts themselves, but something which would have the effect of letting in other evidence of those facts; and the failure to prove that other matter, would not be likely to affect the commission. For these reasons, I think, that in rejecting the bankrupt in this case, we should be going beyond the old principle; and, consequently, that the rule for a nonsuit must be discharged.

BEST, J. The principle upon which bankrupts have been considered incompetent to give evidence in support of the commission, may be collected from *Flower v. Herbert*. I cannot, indeed, agree with that principle, because I think that the lord chancellor would not supersede a commission in consequence of any thing that passed in this court, but would himself inquire into the matter. I should, nevertheless, feel bound by that authority, if this case were precisely similar. But it is not so; and for the reasons already given, I think we should go far beyond the old rule, were we to hold that the bankrupt was not compe-

ent to identify the proceedings, by proving the handwriting of the commissioners. *Being of opinion that the rule ought not to be extended, I agree
 *20] in thinking that the plaintiff is entitled to retain the verdict.

Rule discharged.

LATHAM and Others v. RUTLEY and Others.

Declaration, that for certain hire and reward defendants undertook to carry goods from London and deliver them safely at Dover. The contract proved was, to carry and deliver safely (fire and robbery excepted:) Held, that this was a variance.

Assumpsit against the defendants, common carriers between London and Dover. The declaration stated that the plaintiffs, at the request of the defendants, delivered to them a parcel of country bank notes of great value, to wit, &c., to be carried from London to Dover, and there delivered; that the defendants in consideration thereof and for certain reward in that behalf, undertook to deliver them safely, but that through their negligence the parcel was lost. Plea, general issue. At the trial before ABBOTT, C. J., at the London sittings after Trinity term, 1822, it appeared that the plaintiffs were bankers at Dover, and were in the habit of sending Bank of England notes to their correspondents in London to take up their own notes and bills, and of receiving the latter in exchange by the wagon of the defendants. When parcels were delivered to be conveyed to London, the defendants gave a receipt to the plaintiffs, engaging to deliver them safely (fire and robbery excepted.) No evidence was given of any special contract respecting the carriage of parcels from London to Dover. In May, 1820, the parcel in question was booked at the wagon-office in London, and was stolen from thence, the door being left open. It was objected for the defendants, that
 *21] the contract for the carriage of *parcels from London to Dover must be taken to be the same as that for the carriage from Dover to London, and that the contract proved was not the same as that stated in the declaration. The lord chief justice left it to the jury to say whether the contract was in both cases the same; and, if so, whether this was a loss by robbery. The jury found that the contract for the carriage of this parcel was subject to the exception of fire and robbery; but that the loss was not by robbery, within the meaning of that exception; and a verdict was taken for the plaintiffs. In Michaelmas term *Scarlett* obtained a rule to enter a nonsuit, on the ground of a variance between the contract found by the jury and that stated in the declaration, against which

The *Solicitor-General*, *Denman*, and *Kaye*, now showed cause. The jury having found that the loss was not by robbery within the meaning of the contract, the plaintiffs are entitled to retain the verdict. The action is founded on the common law liability of carriers; and the proviso introduced in their favour does not alter the nature of the contract to be declared upon: but if the loss had happened by either of those causes, that was matter of defence to be established by evidence. [HOLROYD, J. It does not appear that the defendants received the goods upon their common law liability.] The defendants must rely upon the technical meaning of the word "exception," as opposed to proviso; for in *Clarke v. Gray*, 6 East, 564, it was held that a provision that the carrier should not be responsible for more than 5*l.* did not form any part of the
 *22] contract itself, and need not *be noticed in the declaration; and in *Cotterill v. Cuff*, 4 Taunt, 285, and *Miles v. Sheward*, 8 East, 7, it was held sufficient to state the consideration, and so much of the defendant's promise as could be proved to have been broken.

ABBOTT, C. J. The distinction attempted to be established between an exception and a proviso is very subtle, and was not relied upon at the trial. The question there made was, whether the defendants carried parcels for the plaintiffs from London to Dover, and from Dover to London, upon the same terms;

and the jury found that they did. However reluctant we may be, still we cannot help yielding to the objection taken. The result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but if a stipulation be made, that under certain circumstances he shall not be liable at all, that must be stated. Now here it appeared that in either of two events the carrier was not to be responsible at all; and that exception was not stated in the declaration. The plaintiffs would have been nonsuited but for the necessity of leaving it to the jury to say what was the contract. The defendants are, therefore, entitled to have a nonsuit entered now.

Rule absolute for entering a nonsuit. (c)

Scarlett and Marryat were to have supported the rule.

(c) See *Howell v. Richards*, 11 East, 633; *Thornton v. Jones*, 2 Marsh. 287; *Tempany v. Burmand*, 4 Campb. 20.

*JOHN ATKINS and WILLIAM ATKINS, Executors of JOHN ATKINS v. HENRY TREDGOLD, ROBERT TREDGOLD, [23
JAMES ROLFE, and JOHN KNIGHT, Executors of JOHN TREDGOLD, deceased.

A. and B. made a joint and several promissory note. A. died, and ten years after his death B. paid interest upon the note. In an action brought upon the note against the executors of A. it was held that the payment of interest by B. did not take the case out of the statute of limitations, so as to make A.'s executors liable.

DECLARATION in assumpsit upon three promissory notes made by John Tredgold, deceased, and payable on demand to John Atkins, deceased. The first bore date the 17th January, 1806, and was for 300*l*. The second was for 200*l*., and bore the same date. The third was for 300*l*., and bore date the 17th January, 1809. There were counts for interest for money paid, lent and advanced, had and received, and upon an account stated between the two testators. In all these counts the promises were alleged to have been made by John Tredgold, deceased, to John Atkins. Another count stated that John Tredgold, before his decease, was indebted to John Atkins, in his lifetime, for principal and interest upon the several promissory notes mentioned in the former counts, and for money lent and advanced, money had and received, money paid, laid out, and expended, and for money due and owing from Tredgold to John Atkins upon an account stated between them; and that John Tredgold, since deceased, in his lifetime, being so indebted, and the said several sums of money remaining wholly due and unpaid, the said defendants, as executors as aforesaid, after the death of Tredgold, and before the death of Atkins, promised Atkins to pay him the said sums of money, upon request. There was another count upon an account stated between the defendants as executors, and Atkins, and a *promise by the defendants as executors to pay the sums then found to be due. The defendants pleaded, as to the first set of counts, that John Tredgold did not promise; upon which issue was joined. [24
Secondly, to those counts that the cause of action did not accrue within six years; upon which issue was tendered and joined. And as to the promises in the latter set of counts, that the executors did not promise; upon which issue was joined. And further, as to the promises in those counts, that the defendants did not, within six years, promise; upon which issue was also tendered and joined. The defendant Knight also pleaded ne unques executor, upon which issue was tendered and joined; and also that no goods or chattels of the testator ever came to his hands to be administered; as to which the plaintiffs, in their replication, prayed judgment of assets quando acciderint. At the trial before Abbott, C. J., at the London sittings after Trinity term, 1822, the three promissory notes stated in the declaration were produced in evidence; by them, John

Tredgold and Robert Tredgold jointly or severally promised to pay on demand the several sums therein mentioned. It appeared that Atkins had lent to Robert Tredgold the money for which the promissory notes were given, as securities; and that John Tredgold, who was the father of Robert Tredgold, only became a party to the notes as surety. John Tredgold died in March, 1810, and by his will made the defendants his executors. But defendant Knight did not prove the will or do any act as executor. It was proved that Robert Tredgold continued to pay interest on the notes after the death of his father, and that the last payment was made by him in May, 1816. It appeared by his books, produced in evidence, that these payments were made by him out of his private

*25] estate John Atkins died in September, 1816, *and by his will appointed the plaintiffs his executors. Upon these facts the lord chief justice told the jury, that John Tredgold having died eleven years(a) before the commencement of the action, no express promise could have been made by him within six years; and therefore that the verdict upon the first set of counts must be for the defendants. And as to the question arising upon the pleas to the second set of counts, viz., whether there was any promise by the executors within the six years, he told the jury, that if they thought that the payments made by Robert Tredgold were made by him in his character of executor, they should find for the plaintiffs upon those counts. If, however, they thought the payments were made by him on his own account, as the joint maker of the notes, then they were to find for the defendants. The jury having found a verdict for the defendants, a rule nisi was obtained in last Michaelmas term for a new trial, on the ground that the payment of interest within six years by Robert Tredgold, who was one of the joint makers of the note, even on his own account, was an admission of an existing debt due upon the note itself; and, upon the authority of *Whitcomb v. Whiting*, Doug. 651, took the case out of the statute, even against the representatives of the other joint promiser.

The *Solicitor-General*, (with whom were *Scarlett* and *E. Laues*,) now showed cause. The jury have found, upon the evidence, that there was no promise by the defendants, as executors. The question therefore is, whether the payment of interest within six years, by one of two persons jointly and severally liable on a promissory note, after the death of the other, is such an admission of the existence of the debt as will bind the

*26] *executors of the deceased person. Considering this as a several note, it is quite clear that a payment of interest by Robert Tredgold could not affect John, or his executors. Considering it as a joint note, Robert, after the death of John, would be liable as survivor; and, consequently, payment made by him on account of the note would be a payment in his own right, and not in right of the personal representatives of parties jointly liable with him. Such a payment would, therefore, operate as an admission of an existing debt due from him only. In *Whitcomb v. Whiting*, Doug. 651, the four joint promisers were all alive at the time when the payment of interest was made by one; and that time they were all jointly liable on the note. Here, at the time when the payment of interest took place, the joint liability had ceased by the death of John, and Robert became the only person liable. He was then stopped by the Court.

Gurney and *Selwyn*, contra. It has never been decided that the effect of the statute of limitations is to cancel or extinguish the original demand. In *Leaper v. Tatton*, 16 East, 420, Lord ELLENBOROUGH says, "The promise is an acknowledgment by the defendant that he had not paid the bill; and as the limitation of the statute is only a presumptive payment, if his own acknowledgment that he has not paid the bill be shown, it does away the statute." Here, the payment of interest within six years, by one of the joint makers of the note, is an acknowledgment by him that it has never been paid by any of the parties to it. The effect of the payment therefore is, to revive the note itself; and

(a) The action was commenced in January, 1822.

when once the debt is revived, it exists as the original uncanceled debt of the testator, and the law will raise an implied promise in his executors to pay. *It is true, that in the late case of *Pittam v. Foster*, 1 B. & C. 248, [27 this Court seems to have been of opinion, that the effect of the new promise is to give a new cause of action. The uniform course of pleading, however, is at variance with that doctrine; for the original cause of action, and not the new promise, is always declared on. They cited *Green v. Cooke*, 2 Ld. Raym. 1101; S. C. 6 Mod. 309; *Heylen v. Hastings*, 6 Mod. 309, and *Hickman v. Walker*, Willes, 27. It is true, that in *Bland v. Husebrig*, 2 Vent. 151, it was decided, that the acknowledgment of one out of several who were jointly indebted, did not prevent the operation of the statute of limitations in favour of the others; but that case was overruled by the case of *Whitcomb v. Whiting*, Doug. 651. As to the plea of ne unques executor, the fact of Knight's being named in the will as executor, is sufficient evidence of his having been once executor, so as to entitle the plaintiff to a verdict on that issue; and he cited *Wentworth, Executors*, 184.(a)

ABBOTT, C. J. I think the rule for a new trial must be discharged. The plaintiffs have in one set of counts declared upon three promissory notes payable on demand, made by John Tredgold, in his lifetime, and the promise to pay is alleged to have been made by him. To those counts the defendants have pleaded, that John Tredgold did not promise within six years. It appeared in evidence that John Tredgold had died eleven years before the action was brought; and therefore no such promise could be made. Then there was another count, stating that John Tredgold was indebted upon the *notes, [28 and died leaving the moneys unpaid; and that the defendants as executors, in consideration thereof, promised to pay; and there was also a count upon an account stated, and a promise by the executors. The question for the Court therefore is, whether any promise to pay has been made by the defendants as executors. I cannot agree with the argument, that the mere existence of a debt owing by the testator is evidence of a promise to pay by the executors as executors. There is certainly no authority for that position; and if that be so, then we must seek for evidence of that promise, aliunde. Now the evidence was, that Robert Tredgold paid interest in 1816. The jury have found that he paid it in his own right, and not in the character of executor. There was not, therefore, any thing done by the executors, in that character; and that being so, I should feel a difficulty in saying that a case was made out on those counts, independently of the statute. But there is also a plea, that the defendants did not promise within six years. I think there is no evidence of a promise by all, and certainly not such as to take the case out of the statute of limitations. The evidence was, a payment of interest by Robert Tredgold in his own right. *Whitcomb v. Whiting* was relied upon to show that such payment would take the case out of the statute of limitations. It is not necessary to say whether that case, which is contrary to a former decision in *Ventris*, would be sustained, if reconsidered; but I am warranted in saying, by what fell from Lord ELLENBOROUGH in *Brandram v. Wharton*, 1 B. & A. 463, that it ought not to be extended. The payment was by one of several originally liable. Here we are called upon to go further, and say, that a payment by one of several, liable alieno jure, shall raise an *implied promise by them all. [29 Such a decision would introduce great difficulty in administering the affairs of testators. Suppose an executor to have waited six years, and then no claim having been made, to dispose of the assets in payment of legacies. He might, if the plaintiffs were to prevail, be subsequently rendered liable to the payment of demands to any amount, by the acknowledgment of a person originally joint debtor with the testator. The inconvenience and hardship arising from

(a) But see also *Wentworth*, p. 42, and the Year-book, 27 Hen. 8. pl. 26, and 9 Edw. 4. pl. 33, and *Bac. Abr. tit. Executors*, (E. 9.)

such a liability satisfies me that the principle of *Whitcomb v. Whiting* ought not to be extended to this case. For these reasons I think this rule must be discharged.

BAYLEY, J. My opinion in this case is founded, not upon the case of *Pittam v. Foster*, but upon independent grounds. The plaintiffs cannot take the case out of the statute, as to the first set of counts, because the testator had been dead ten years before the action was brought. But they seek to do that as to the other counts, by showing an acknowledgment made by one of several who were liable; but that is not the legal effect of the payment made by Robert Tredgold. It is said, that a joint promiser having made a payment within six years, the executors of the other are liable; and the case of *Whitcomb v. Whiting* is relied upon. That is certainly a very strong case, and it may be questionable whether it does not go beyond proper legal limits. But that case is distinguishable from the present in two particulars. Here, the statute appears to have attached before the payment was made by Robert Tredgold; and therefore John Tredgold, being at that time protected, could not be subjected to any new obligation by the act of Robert. And, secondly, the parties sought to be charged

*30] in this action by means of an implied promise are not those originally liable, as was the case in *Whitcomb v. Whiting*. I entirely agree with my lord chief justice, that we ought not to extend the doctrine of that case to executors.

HOLROYD, J. I, also, am of opinion, that the circumstances of this case do not take it out of the statute of limitations. *Whitcomb v. Whiting* is the only case that can be relied on by the plaintiffs. That case has gone far enough; but it does not govern the present. There, the defendant Whiting was liable, upon a joint promise, at the time when the payment was made. The Court decided, that when one of two joint promisers pays a part, that was to be considered in law as a payment by both. But here, at the time when the payment was made by Robert Tredgold the joint contract had ceased to exist; for it was determined by the death of John Tredgold. The note then became the several note of the parties to it. To hold such a payment to raise an implied promise sufficient to bind the defendants, would be to decide, that, where the promises are several, a promise by one party would bind the rest. The plaintiffs cannot recover in this case, without proving a joint promise by the defendants, as executors; and in order to do that, the executorship must be proved, although that is unnecessary where the demand is founded on promises made by the testator; for then the plea ne unques executor must be proved by the party pleading it. One of the defendants was not proved to have done any act as executor. But it has been argued, that being named as such in the will he is liable, upon these

*31] pleadings, although he has never accepted the office. I much doubt that; but it is unnecessary to decide upon that ground, (a) inasmuch as this case is distinguishable from *Whitcomb v. Whiting*, even if that be law. Here, at the time when the payment was made by Robert Tredgold, he was not connected in a joint contract either with John Tredgold or his executors. His separate character only remained.

BEST, J. The counts on promises by the testator are disposed of by *Pittam v. Foster*. Then, as to the others, it is sufficient to say, that the implied promise not having been made by Robert Tredgold in the character of executor, it does not prove the issue. The present case is therefore distinguishable from *Whitcomb v. Whiting*; beyond which I think the Court ought not to go. The rule must, therefore, be discharged.

Rule discharged

(a) See *Townson v. Tickell*, 3 B. & A. 38, and *Bonifant v. Greenfield*, 1 Leon. 60., Cro. Eliz. 80

Ex parte HAWKINS.

Where a conviction stated that "C. H. was convicted of having been found on board a vessel subject to forfeiture, for hovering within the limits of a port of this kingdom, having certain contraband goods on board." *Held*, that this was bad. First, for that it should have been stated that the vessel was hovering without lawful excuse. Secondly, for that C. H. should have been described as a British subject.

THE prisoner was brought up on a writ of habeas corpus. The return set out a conviction in the following form: "Be it remembered, that on, &c. C. Hawkins had been duly convicted before me, &c. of having been found and taken on board a certain vessel, subject and liable to forfeiture under the provisions of a certain act of parliament made and passed, &c.; for that the said vessel was on, &c. found *hovering* within the limits of a port of this kingdom, to wit, the port of Rye, in the county of Sussex, and then and there having *on board, &c. (various contraband articles;) which offence hath been [*32 duly proved, &c. And the said C. Hawkins being a seafaring man, and fit and able to serve his majesty in his navy, I do hereby adjudge the said C. Hawkins to serve in his majesty's naval service," &c. The return having been read, *Platt* moved that the prisoner might be discharged, because it did not appear on the face of the conviction that the vessel was liable to forfeiture; and, secondly, because it was not alleged that Hawkins was a British subject.

Jervis showed cause. The conviction does show that the vessel was liable to forfeiture, for it states that she was found hovering within the limits of a port of this kingdom. By the 24 G. 3, c. 47, s. 1, it is enacted, "That if any ship or vessel shall be found at anchor or *hovering* within the limits of any of the ports of this kingdom, or within four leagues of the coast thereof, or shall be discovered to have been within the said limits or distance, (and not proceeding on her voyage, wind and weather permitting, unless in case of unavoidable necessity and distress of weather,) having on board any brandy, &c., or any goods liable to forfeiture by any act of parliament upon being imported into Great Britain; then not only all such goods, but also the ship or vessel on board which they shall be found as aforesaid, shall be forfeited." The words in the parenthesis, "not proceeding on her voyage," &c. apply only to vessels discovered to have been found within a certain distance of the coast, and not to those which are found hovering with the goods specified on board. That is of itself an offence, and subjects the vessel to forfeiture. Then the 45 G. 3, c. 121, s. 7, makes liable to arrest all British subjects *found or discovered [*33 to have on board any ship or vessel liable to forfeiture under the provisions of that or any other act for *hovering*, unless they prove that they were passengers; and the 3 G. 4, c. 110, gives a general form of conviction, which has been followed in this case, and which does not require that the offender should be described as a British subject.

Platt, *contra*. The words "not proceeding on her voyage," being in a parenthesis, must apply to all the preceding parts of the section; and it is reasonable that they should do so, for a vessel may hover legally and with the intent to proceed on her voyage as soon as the wind or tide will permit. According to the construction contended for on the other side, a vessel cannot lie to for any person, however innocent, without being liable to forfeiture. Then, as to the second objection, it is true that the 3 G. 4, c. 110, gives a general form of conviction; but that requires the offence to be set out, and the allegation that the party was a British subject, is part of the description of the offence; for unless he be such subject he is not within the operation of the 45 G. 3, c. 121, s. 7. *Kite and Lane's case*, 1 B. & C. 101, shows that the general form of conviction does not dispense with the necessity of stating these matters correctly.

Per Curiam. The offence is not sufficiently described in the conviction, for

it does not appear that the vessel was liable to forfeiture. It is merely stated that the vessel was found hovering with certain goods on board. But a vessel *34] may be hovering, and still not be liable to *forfeiture. It would be putting too narrow a construction on the act to confine the application of the words "not proceeding on her voyage" to those vessels which have been within a certain distance of the coast; for if that were so, vessels hovering for a pilot, or for any other innocent purpose, might be subjected to forfeiture. The hovering contemplated by the legislature is, hovering with power to proceed, and without any sufficient cause for not doing so. The conviction is bad upon another ground also, viz., that the party is not described as a British subject. If he were not so, the thing charged against him would not constitute an offence within the 45 G. 3, c. 121, s. 7, or render him liable to punishment. Every thing necessary to show that an offence has been committed must be stated in a conviction; the allegation of his being a British subject was, therefore, essential to the description of the offence, and that must be correctly stated, notwithstanding the general form given by the 3 G. 4, c. 110. The prisoner must, therefore, be discharged. Prisoner discharged. (a)

a) Bayley, J., had left the court.

In the Matter of STEAVENSON and Others.

The annual indemnity act is prospective as well as retrospective, and extends to those who may be in default during the time for which it is made, and is not limited to those who had incurred penalties or disabilities before it passed.

SCARLETT moved for a quo warranto information against the mayor and four bailiffs of Berwick. These officers were elected on the 29th of September in the last *year; and were on the same day sworn and admitted into their *35] respective offices. They all neglected to receive the sacrament, and take the oath of allegiance, &c., within six months, as required by the 25 Car. 2, c. 21; 16 G. 2, c. 30; 1 G. 1, st. 2, c. 13, and 9 G. 2, c. 26. It will be urged that they are protected by the last annual indemnity act. (a) But that act passed on

(a) The 4 G. 4, c. 1, intituled "An act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices, employments, and for extending the time limited for those purposes respectively until the 25th day of March, 1824." The preamble recites that divers persons required to take certain oaths, and do certain other acts by certain statutes therein recited, have, "through ignorance of the law, absence, or some unavoidable accident, omitted to take and subscribe the said oaths, &c., within such time and in such manner as in and by the said acts respectively, or by any other act of parliament in that behalf made, is required, whereby they have incurred, or may be in danger of incurring, divers penalties and disabilities;" and then it proceeds to enact, "that all and every person and persons who, at or before the passing of this act, hath or shall have omitted to take and subscribe the said oaths, &c., within such time, and in such manner as in and by the said acts or any of them, or by any other act of parliament in that behalf made, is required, and who, after accepting any such office, &c., before the passing of this act, hath or have taken and subscribed the said oaths, &c., or who on or before the 25th day of March, 1824, shall take and subscribe the said oaths, &c., shall be and are hereby indemnified, freed, and discharged from and against all penalties and disabilities incurred, or to be incurred, for or by reason of any neglect or omission, previous to the passing of this act, of taking or subscribing the said oaths or assurance, or receiving the sacrament, or making or subscribing the said declaration, or taking or subscribing the said oath according to the above mentioned acts or any of them, or any other act or acts; and such person or persons is and are, and shall be fully and actually recapitulated and restored to the same state and condition as he, she, or they were in before such neglect or omission, and shall be deemed and adjudged to have duly qualified him, her, or themselves, according to the above-mentioned acts and every of them; and that all elections of, and acts done or to be done by any such person or persons, or by authority derived from him, her or them, are and shall be of the same force and validity, as the same or any of them would have been, if such person or persons respectively had taken the said oaths or assurance, and received the sacrament of the Lord's supper, and made and subscribed the said declarations, and taken and subscribed the said oath according to the directions of the said acts and every or any of them; and that the qualification of such person or persons qualifying themselves in manner and within the time appointed by this act, shall be to all intents and purposes as effectual as if such person or persons had respectively taken the said oaths and assurance, and received the sacrament, and made and subscribed the said declaration, and taken and subscribed the said oath within the time and in the manner appointed by the several acts before mentioned."

the 27th *of February last, and only appliee to those who "at or before the passing of the act," had incurred penalties or disabilities. These persons being elected on the 29th of September, had not incurred any penalty or disability when the indemnity act passed, and cannot therefore be protected by it. [*36]

Campbell showed cause in the first instance. The object of the indemnity act was to enlarge the time before allowed for receiving the sacrament, taking the oath, &c., required of persons accepting certain offices and employments. The preamble of the statute certainly appears to be limited to such persons as had made default before the act passed, but is capable of receiving a larger construction. The title is material, to show a different intention in the legislature: that is, "An act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and for extending the time limited for those purposes respectively." The enacting part too extends to all those who, at or before the passing of the act, *have* or *shall have* omitted, &c. That certainly is future as well as past, and must extend to all that are in default before the 25th of March, 1824.

**Per Curiam*. There may perhaps be some obscurity in the words of this statute, but there is none in its title. It was manifestly the intention of the legislature to extend the time for taking the oaths and performing the other acts required of persons filling certain offices; and this being a remedial statute, we should so construe it as to give full effect to that intention. [*37]

Rule refused.

BALDEY and Another v. PARKER.

A. went to the shop of B. and Co., linen-drappers, and contracted for the purchase of various articles, each of which was under the value of 10*l*., but the whole amounted to 70*l*.. A separate price for each article was agreed upon; some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them: *Held*, first, that this was all one contract, and therefore within 29 Car. 2, c. 3, s. 17. Secondly, that there was no delivery and acceptance of any of the goods so as to take the case out of the operation of that section.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before ABBOTT, C. J., at the London sittings after Trinity term, 1822, the following appeared to be the facts of the case. The plaintiffs are linen-drappers, and the defendant came to their shop and bargained for various articles. A separate price was agreed upon for each, and no one article was of the value of 10*l*.. Some were measured in his presence, some he marked with a pencil others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. A bill of parcels was accordingly made out and sent by a shopman. The amount of the goods was 70*l*.. The defendant looked at the account, and asked what discount would be allowed for ready money, and was told 5*l*. per cent.; he replied that it was too little, and requested to see the person of whom he bought the *goods, (Bal- [*38] dey) as he could bargain with him respecting the discount, and said that he ought to be allowed 20*l*. per cent. The goods were afterwards sent to the defendant's house, and he refused to accept them. The lord chief justice thought that this was a contract for goods of more than the value of 10*l*.. within the meaning of the seventeenth section of the statute of frauds, and not within any of the exceptions there mentioned, and directed a nonsuit; but gave the plaintiffs leave to move to enter a verdict in their favour for 70*l*.. A rule having accordingly been obtained for that purpose,

Scarlett and *E. Lawes* now showed cause. It is quite clear that this was an entire contract for the whole of the goods. Suppose after the bargain for them all was made, the plaintiffs had refused to let the defendant have some one par-

ticular article, they could not have compelled him to take the residue; or if one of the articles when sent home differed from that bargained for, the purchaser might have rejected the whole, for no jury would ever have found that there were separate contracts, and have compelled him to take that part which corresponded with the order. Then as to the supposed acceptance, the plaintiffs always retained their lien for the price; the defendant had no right to take away the goods without paying for them, nor could he have maintained trover without tendering the price. There was not then any such change of possession as contemplated by the statute.

Denman and Platt, contra. The plaintiffs are entitled to a verdict on both grounds. For there was a separate and distinct bargain for each article; and even *if that were not so, the defendant accepted the goods, so as to take
 *39] the case out of the statute of frauds. Whether the contracts were several or not, cannot depend upon the time when the various articles were purchased, but upon what passed at the making of the bargain. Now it was distinctly proved that a separate price was fixed upon each article, and the purchase of each was complete before the parties went on to bargain for any others. If that be not so, it will be difficult to determine what space of time must elapse between the purchase of any two articles, in order to make the contract separate. In *Emmerson v. Heekis*, 2 Taunt. 38, it was held that the purchaser of several lots at an auction was to be considered as making a separate contract for each lot. Had the defendant left the shop for a few minutes between the purchase of each article, that certainly would have made them separate contracts, and there does not appear to be any substantial difference between such a case and the present. Then as to the second point, there was a complete delivery and acceptance within the meaning of the statute. There was a complete change in the state of the property. The defendant assisted in measuring the articles, and in severing them from the bulk; the price of each was fixed; so that nothing remained to be done before they were to be delivered to the defendant. The change of property was therefore complete. *Rugg v. Minett*, 11 East, 210. Some the defendant actually marked with a pencil; and in *Hodgson v. Le Bret*, 1 Campb. 233, that was considered as an acceptance. So also was cutting off the
 *40] pegs in pipes of wine. **Anderson v. Scott*, 1 Campb. 235, n. The policy of the statute of frauds was, that a mere verbal agreement should not bind; but it does not apply where any act has been done to show the approval of the contract. *Chaplin v. Rogers*, 1 East, 192; *Elmore v. Stone*, 1 Taunt. 458; *Searle and Others v. Keeves*, 2 Esp. 598. [HOLROYD, J. *Hanson v. Armitage*, 5 B. & A. 557, and *Carter v. Toussaint*, 5 B. & A. 855, are strong authorities against you.] In the former, the purchaser had not exercised any judgment on the article ordered, and in the latter the firing of the horse was the act of both parties, and not done to show an approval of the contract. Neither does *Howe v. Palmer*, 3 B. & A. 321, apply, for the goods were severed by the vendor alone. With respect to the vendor's right of lien, that has never been decided to be the criterion by which cases of this nature are to be judged of. Indeed lien imports that the property has passed. [HOLROYD, J. If the property has passed subject to a lien, is that a delivery and acceptance within the meaning of the statute?]

ABBOTT, C. J. We have given our opinion upon more than one occasion, that the 29 Car. 2, c. 3 is a highly beneficial and remedial statute. We are therefore bound so to construe it as to further the object and intention of the legislature, which was the prevention of fraud. It appeared from the facts of this case, that the defendant went into the plaintiffs' shop and bargained for various articles. Some were severed from a larger bulk, and some he marked in order to satisfy himself that the same were afterwards sent home to him.

*41] The *first question is, whether this was one entire contract for the sale of all the goods. By holding that it was not, we should entirely defeat

the object of the statute. For then persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the statute by making a separate bargain for each article. Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles. The plaintiffs cannot maintain this action unless they can show that the case is within the exception of the 29 Car. 2, c. 3, s. 17. Now the words of that exception are peculiar, "except the buyer shall accept part of the goods so sold, and actually receive the same." It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance were complete in this case, it would seem to follow as a necessary consequence that the vendee might maintain trover without paying for the goods, and leave the vendor to this action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying that this transaction had no such effect.

BAYLEY, J. The buyer cannot be considered to have actually received the goods, when they have remained from first to last in the possession of the seller. The plaintiffs are not assisted by the exception in the seventeenth section of the statute of frauds. Then the question is, whether there was a separate contract for each article. The 29 Car. 2, c. 3, was passed to guard *against [42] frauds and perjuries; and it must be collected from the seventeenth section, that the legislature thought that a contract to the extent of 10*l.* might be sufficient to induce the parties to it to bring tainted evidence into court. Now it is conceded here, that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than 10*l.* Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than 10*l.* within the seventeenth section of the statute; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law. It has been asked, what interval of time must elapse between the purchase of different articles in order to make the contract separate, and the case has been put of a purchaser leaving a shop after making one purchase and returning after an interval of five or ten minutes, and making another. If the return to the shop were soon enough to warrant a supposition that the whole was intended to be one transaction, I should hold it one entire contract within the meaning of the statute. I am therefore of opinion that this rule must be discharged.

HOLROYD, J. I am of the same opinion. The intention of the statute was that certain requisites should be observed in all contracts for the sale of goods for the price of 10*l.* and upwards. This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than 10*l.*, but in the course of the dealing it grew to a contract for a much larger amount. At last therefore it was one *entire contract [43] within the meaning and mischief of the statute of frauds, it being the intention of that statute that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of 10*l.* it should not bind unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l.* as if it had been originally of that amount. It must therefore be considered as one contract within the meaning of the act. With respect to the exception in the seventeenth section, it may perhaps have been the intention of the legislature, to guard against mistake, where the parties mean honestly as well as against wilful fraud; and the things required to be done will have the effect of answering both those ends. The words are, "except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in

earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Each of those particulars either shows the bargain to be complete, or still further, that it has been actually in part performed. The change of possession does not in ordinary cases take place until the completion of the bargain: part payment also shows the completion of it; and in like manner a note or memorandum in writing signed by the parties plainly proves that they understood the terms upon which they were dealing, and meant finally to bind themselves by the contract therein stated. In the present case there is nothing to show that

*44] some further arrangement might not remain unsettled after the price for each article had been agreed upon. There was neither note nor memorandum in writing; no part of the price was paid, nor was there any such change of possession as that contemplated by the statute. Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.

BEST, J. It was formerly considered that a delivery of the goods by the seller was sufficient to take a case out of the seventeenth section of the statute of frauds; but it is now clearly settled, that there must be an acceptance by the buyer, as well as a delivery by the seller. The statute enacts, that where the bargain is for something to the value of 10*l.* it shall not bind, unless something unequivocal has been done to show that the contract is complete. Nothing of that kind having been done in this case, if the dealing is to be considered as one entire transaction, it is clear that the plaintiffs cannot recover: whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account. It is therefore very distinguishable from *Emmerson v. Heelis*, where a complete bargain was made as to each article, as soon as the auctioneer had signed his name to it.

Rule discharged.

45*]

*WHITELEGG v. RICHARDS.(a)

Declaration stated that the defendant, being the clerk of the court for the relief of insolvent debtors, wrongfully and maliciously intending to injure the plaintiff, and to cause one S. C., in custody at the suit of the plaintiff, to be discharged out of custody without paying plaintiff his damages and costs, wrongfully and unlawfully issued an order, purporting to be an order from that court, and purporting that the prisoner should be discharged from custody; whereas in truth and in fact, the Court did not pronounce any such order, nor give any authority to the defendant to issue the same, by reason whereof the prisoner was discharged from custody: Held, upon error, brought upon a judgment of C. P., given for defendant upon demurrer to the declaration, that it was not necessary to aver that the order had been set aside by the Court; for the order was to be considered the act of the officer, and not of the Court.

This was a writ of error, upon a judgment given in the Court of Common Pleas, on demurrer to a declaration. The substance of the pleadings is stated in the judgment delivered by the Court. The case was now argued by

Campbell, for the plaintiff in error. The substance of the complaint in the declaration is, that the defendant being an officer of the court for the relief of insolvent debtors, and maliciously intending to cause the debtor detained in custody at the suit of the plaintiff to be discharged, issued an order for his discharge, whereby the plaintiff lost all means of recovering his debt. The issuing of that order was a wrongful act by the defendant, and the plaintiff has sustained a temporal damage by losing the body of his debtor, which, accord-

(a) See the first count of the declaration set out at length in 3 Brod. & Bing. 188.

ing to BULLER, J., he had a right to keep every hour till the debt is paid. *Plank v. Anderson*, 5 Term Rep. 37. In Com. Dig. tit. *Action upon the Case for Deceit*, (A 6,) it is laid down, "that such action will lie if an officer, being intrusted by the law, act *deceptive* in his office;" or, if the escheator return a writ directed to him, without "making an inquest, though he be an officer of record. "So, if the under escheator make a return different [*46 from the office found by the escheator." And in tit. *Action upon the Case for Misfeasance*, (A 1,) it is laid down, "that an action upon the case lies against an officer for a misfeasance, as if an officer misdemean himself by any falsity." "So, if a prothonotary of C. B. award a supersedeas irregularly to process, upon which A. is arrested at the suit of another." And Lutwych, 96, is referred to. That was an action by *Sir Edward Smith, Bart., v. Winford*, the prothonotary, for issuing a writ of supersedeas, in consequence of which one E. A., whom the plaintiff had caused to be arrested, was discharged, without bail, or any appearance being entered with the filazer. The declaration in the present case follows precisely the precedent to be found in Lutwych. The declaration there did not contain any averment that the supersedeas was set aside for irregularity. It is true, that in that case the plaintiff was nonsuited, for not entering the issue in due time; and, therefore, the question, whether the action was maintainable, could not have arisen, either upon motion in arrest of judgment or in error. Lord Chief Baron COMYNS, however, lays down the proposition broadly, that the action is maintainable. In *Herbert v. Paget*, 1 Levinz, 64, it was held, by two judges, that the action lies against the *custos brevium*, who keeps the records in his office so negligently, that they are altered, though they do not appear to be so by his consent; and attorneys have always recourse to the records there. And this opinion of the two judges is referred to with "approbation by Lord Chief Baron COMYNS, in his Digest, tit. *Action upon the Case for Negligence*, (A 2;) and in the same title he [*47 lays it down in the words used by Lord HOLT, in *Ashby v. White*, Salk. 18, that in every case where an officer is intrusted by the common law or by statute, an action lies against him for a neglect of the duty of his office. In *Douglas v. Yallop*, 2 Burr. 722, Lord MANSFIELD intimates an opinion, that an action on the case would lie against the chief clerk of this court for not entering a judgment, after he had received his fees for so doing, by a purchaser who should have become liable to it, and had searched the roll without finding it entered up. The material distinction in such cases is between ministerial and judicial offices. In *Schinotti v. Bumsted*, 6 T. R. 646, an action was held to be maintainable against the commissioners of the lottery for withholding a prize against the person entitled to receive it; and in that case malice was not alleged. In *Harman v. Tappenden*, 1 East, 561, it was held, that an action would not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happened to the plaintiff; but LAWRENCE, J., there intimated an opinion that the action might have been maintained if it had been proved that the defendants, intending to injure the plaintiff, had wilfully and maliciously done the act complained of. *Drewe v. Coulton*, 1 East, 563, and *Milward v. Sergeant*, 1b. 567, are authorities to show that an allegation that the defendant, "knowing, &c., and wrongfully intending to injure the plaintiff," amounts to an allegation of malice. But, in the present case malice is expressly alleged.

"It was contended in the court below, that the plaintiff had sustained no damage, inasmuch as he could have no interest in his debtor's detention, when, in pursuance of the act, he had assigned all his present and future effects to his creditors. The imprisonment of the debtor is considered in law as a satisfaction to the creditor. The debtor still remained in custody in execution at the suit of the plaintiff. For the 1 G. 4, c. 119, s. 18, enacts, "that in the cases therein mentioned, the debtor is not to be discharged until he shall [*48

have been in custody at the suit of the creditor, for any period not exceeding two years." Under this section the Court ordered the debtor to be confined two years. This objection does not apply to the last count. (a) The proceedings in the insolvent debtor's court are not there mentioned. Besides, an action will lie against a sheriff, for the escape of a person arrested upon an excommunicatio capiendi issued in a suit for non-payment of tithes, *Slipper v. Mason*, 2 Ld. Raym. 788; or of a person in custody upon a capias ulagatum after outlawry upon mesne process, *Cooke v. Champneys*, 2 Str. 900; or *49] *of one committed by commissioners of bankrupt for refusing to answer interrogatories. *Barnes v. Carey*, Moore, 834; 1 Rolle's Rep. 47; 2 Bulstr. 236. In all these cases the party was in custody for the contempt, yet the action was held to be maintainable by the plaintiffs in the original suits.

The court below pronounced judgment in favour of the defendant, on the ground that the order mentioned in the declaration was to be considered the act of the court. It is, however, expressly averred, not only that the defendant made the order without any authority from the court; but that, in truth and in fact, the court did not at any time pronounce any such order. The word "order" means only a paper in the form of an order. It is not an act of the court; it is delivered out by the officer. In actions, indeed, between third persons, the order, signed by the proper officer of the court, may be *prima facie* evidence of an act done by the court; yet, in an action against the officer himself for wrongfully making such an order, it cannot be competent to him who has wrongfully made the order to say that it is the order of the court. It might have been contended, if the case had gone to trial, that the only admissible evidence to show that the order was not the order of the court, was the rule to set it aside, but non constat that such a rule might not have been produced if the case had gone to trial. It cannot be necessary to set out the evidence in the declaration. Besides, suppose the order to have been issued the last day of the five years for which the court was established by the act of parliament, no *50] application in that case could have been made *to set it aside; yet surely an action for maliciously issuing it would have been maintainable. An action will lie for maliciously suing out a writ, although the writ be not set aside; yet the writ itself, in that case, will be a justification to the jailer for detaining the party in custody; & *fortiori*, an action for maliciously issuing such writ will lie against an officer of the court, whose peculiar duty it is not to abuse its process.

Talfourd, *contra*. The general principle may be conceded, that an action is maintainable against an officer of a court, for maliciously issuing, without authority, a paper purporting to be an order of the court. It may also be conceded, that a sufficient damage is alleged (especially in the last count) to maintain the action. But the judgment of the court below may be supported, upon the ground that the order, upon the face of the declaration must be considered the act of the court. It is alleged that the defendant was a clerk and an officer of the court; and that it was his duty, as such officer, to issue an order of that court, ordering that the prisoner should be discharged. The moment such order was signed and issued by him, it became the act of the court, and it would continue the act of the court until set aside; and the 1 G. 4, c. 119, s. 21, expressly directs that the court shall order that the prisoner be discharged.

(a) That count charged that the defendant was a clerk of the court, &c., and that S. C. was in custody of the keeper of Lancaster jail, for certain damages, to wit, &c., yet defendant so being such clerk, well knowing the premises, but not regarding the duty of his office as such clerk, and wrongfully and maliciously contriving and intending to injure the plaintiff in this behalf, and to cause the said S. C. forthwith to be discharged from custody, and to deprive the plaintiff of the means of recovering his said last-mentioned damages, without any authority from the court wrongfully made out and issued an order, purporting to be an order from the said court, &c., and purporting that the said court did order that the prisoner be discharged from custody as to the plaintiff, whereas in truth the court did not pronounce any such order, or give any authority to the defendant to make out or write the same, by means whereof, &c.

The declaration, therefore, in this case, ought to have contained an averment that the order was set aside. The case in *Lutwych* is no authority, inasmuch as the judgment was given for the defendant. The present declaration puts the intention of the judges, in pronouncing the order, as a question for the jury, and *sets up that supposed intention against the order which is the act of the court. *Cur. adv. vult.* [*51]

ABBOTT, C. J., now delivered the judgment of the Court.

This case was argued before us in the course of the present term. It is a writ of error brought on a judgment given in the Court of Common Pleas in an action on the case. The judgment of that court was in favour of the defendant in the action, and the plaintiff below is also the plaintiff in error. The declaration alleges in substance, that the defendant was the clerk of the court for the relief of insolvent debtors; and that being such clerk, and wrongfully and maliciously intending to injure the plaintiff, and to cause one Chorlton, who was in custody at the suit of the plaintiff, to be forthwith discharged out of custody without paying the plaintiff his damages and costs, and to deprive the plaintiff of the means of recovering the same, wrongfully and unlawfully wrote, made out, and issued an order, purporting to be an order from the court for the relief of insolvent debtors, entitled, "In the matter of the petition of Streuall Chorlton," and directed to the jailer of Lancaster, and purporting thereby that the said court did order that the prisoner should be discharged from custody, as to the plaintiff, at whose suit he was detained; whereas in truth, and in fact, the said court did not pronounce any such order, nor give any authority to the defendant to write, make out, or issue the same. By means whereof, the said order being exhibited to the jailer, Chorlton was discharged from custody against the will of the plaintiff, the debt and damages being *unsatisfied, by means whereof the plaintiff has been greatly injured, and lost all means of enforcing payment from Chorlton. This may be taken as the substance of all the counts of the declaration; but it further appears by some of them, with more or less particularity, that Chorlton had been brought up before the justices at the Quarter Sessions at Lancaster, and had been by them adjudged to remain in actual custody for two years at the suit of the plaintiff, before he should be discharged from custody by virtue of the act. [52]

On the argument before us, some authorities were quoted to show, that an action upon the case may be maintained against an officer of a court for a falsity or misconduct in his office, whereby a party sustains a special damage; and that, in this case, a damage was plainly shown by the loss of the means of enforcing payment from the debtor, as in actions against sheriffs or jailers for an escape.

It is not necessary to repeat the authorities quoted. The general principle was not controverted. But on the part of the defendant, it was insisted that the order mentioned in the declaration must, upon this declaration, be understood to be the act of the court, although the writing might not be conformable to the words pronounced by the court; that the order, therefore, would be in force until it should be set aside by the court; and, consequently, that the action could not be maintained without an averment that it had been in fact set aside.

It is not necessary to consider whether this consequence would follow legitimately from the premises, supposing the premises to be correct, because we are all of opinion that the premises are incorrect; and we think that, upon this declaration, the instrument in *question must be understood and taken not to be the act or order of the court. The intention of the defendant in writing, making out, and issuing this instrument, is charged to have been wrongful and malicious. The act of writing, making out, and issuing, is charged to have been wrongful and unlawful; and there is a positive and formal averment, not only that the court did not pronounce any such order, but also, that the court did not give any authority to the defendant to write, make out, or issue [53]

the same. Whether these allegations can or cannot be proved, is quite a distinct matter, and a matter with which we have at present no concern. It is true that the instrument is called an order, purporting to be an order of the court, and purporting that the court did order the discharge of Chorlton; but looking at the whole declaration, and adverting to the other allegations that have been noticed, we think the word "order," as here used, must be understood to denote the *form* only of the instrument. Thus, the statute against forgery, 45 G. 3, c. 89, mentions the forging of any will, testament, bond, warrant, or order, for the payment of money, bank note, bank bill of exchange, and many other instruments. And the legislature must in this statute, as in many others that have passed on the same subject, be understood in mentioning these instruments, to speak of them as being such in *form* only, for a forged instrument cannot be, *in fact*, a testament, bond, warrant, order, or bank note, and all this is conformable to the common language and understanding of mankind. For this reason we are of opinion that the judgment ought to be reversed.

Judgment reversed.

*54]

*The KING v. JOLIFFE.

A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom. A custom for the steward of a court-leet to nominate certain persons to the bailiff, to be summoned on the jury, is a good custom.

Quo warranto, calling upon the defendant to show upon what authority he claimed to exercise the office of mayor of the borough of Petersfield. Plea, that Petersfield is an ancient borough; and that from time immemorial, there hath been a court-leet or view of frankpledge holden in and for the borough, on, &c.; and that the jury sworn and serving at that court, have presented a fit person to be mayor of the borough for one whole year; and that the person so presented, hath always been sworn in at that court before the steward, and being so presented and sworn, hath executed the office of mayor for one year; that, at the court-leet duly holden on, &c., certain persons, (naming them,) good and lawful men, &c., were then and there duly sworn, as and for the jury, then and there to serve as the jury, and did serve as the jury at the said court; and being so sworn, and so serving, presented defendant to be mayor; and that he being so presented, was duly sworn before the steward, and by virtue of the premises claimed to be mayor. To this plea there were eighteen replications, but the eighth only was material, viz., that the court-leet of the said borough have immemorially presented a fit person to be bailiff, who is always attendant upon the court. That, at the court mentioned in the plea, the steward nominated the fourteen persons mentioned in the plea, who served on the jury, and issued his precept to the bailiff to summon those persons; and that the bailiff

*55] did accordingly summon them: *whereas, by the law of the land, the steward should have issued his precept to the bailiff to summon a jury, and the particular persons should have been selected by the bailiff. Rejoinder, that from time immemorial the steward has been used to nominate the jurors. Issue thereon. At the trial before BURROUGH, J., at the last Summer assizes for the county of Hampshire, the defendant proved, that for more than twenty years the precept to the bailiff had always contained a list of persons whom the steward directed him to summon as jurors. No evidence was given for the crown to show that any other practice had ever prevailed in the borough. The learned judge told the jury, that slight evidence, if uncontradicted, became cogent proof; and they found a verdict for the defendant. In Michaelmas term, Pell, Serjt., obtained a rule nisi for a new trial, on the ground that there was not sufficient evidence to warrant the finding of the jury; or to enter judgment for the crown, *non obstante veredicto*, on the ground that the custom set out in the rejoinder was bad in law.

Scarlett, Adm., C. F. Williams, and Mereweather, showed cause. The evidence was quite sufficient to warrant the finding of the jury. The commencement of the practice was not shown; and therefore, in the absence of any proof to the contrary, it must be presumed that the custom, which had existed for more than twenty years, had existed from time immemorial. Indeed, all the evidence being for the defendant, a verdict for the crown must have been wrong. As to the second point, it is only necessary to advert to the nature of the court leet, in order to show that there is no ground for this application. The court leet is derived from the *sheriff's tourn, and its jurisdiction is the same. [*56 Com. Dig., *Leet* (B.) In the tourn the sheriff is judge, and nominates the jury; in the leet the steward is in the place of the sheriff; why then should he not exercise the same power? At common law, all residents were bound to attend the court without summons; and when they were assembled, the sheriff nominated a jury. If in order to secure a sufficient attendance, he sent his bailiff to summon the residents, there was nothing illegal in that; and he might select the jury from those summoned. In the leet the rules were the same; and the steward, in case of a deficiency, might even swear on the jury a stranger happening to be present. 1 Roll. Abr., *Court* (Y.) pl. 1. Suppose, instead of desiring the bailiff to summon certain persons, he had ordered him to summon all residents; when they came, the steward certainly would be the proper person to nominate the jury. Indeed the law does not recognise a sheriff's bailiff, but considers all the acts of the latter as done by the sheriff himself. In many instances besides the tourn, the sheriff nominates the jury and presides as judge; as in writs of redisseisin and writs of inquiry. In this particular case the steward was manifestly more independent than the bailiff, for the latter is annually elected by the leet jury: it would therefore be very singular if he were to be intrusted with the selection of that jury. *Crane v. Holland*, Cro. Car. 138, shows, that *by custom* the same person may summon the jury and act as judge; and here such a custom is found to have existed from time immemorial. There is not, therefore, any pretence for not entering judgment for the crown.

**Pell, Serjt., Gaselee, Colman, and Carter*, contra. It was incumbent [*57 on the defendant at the trial to prove, that a custom for the steward to nominate the jury had existed from time immemorial. The mere practice for twenty years past was insufficient to raise such a presumption, or to justify the opinion expressed by the learned judge, that such evidence upon such an issue was cogent proof. But whatever may be the opinion of the Court upon that point, the custom itself is unreasonable and bad. The 1 R. 3, c. 4 shows that the bailiff is the proper officer to appoint the jury, for it imposes a penalty upon him for *returning* improper persons. Now he could have no power over the return if merely a summoning officer. The 11 H. 4, c. 9 does not in terms apply to courts leet, but it does in principle; and enacts, that the bailiffs of franchises are to return the inquest, without the nomination of any. [HOLROYD, J. That act does not take away from any the authority which they had before.] The precedent given by *Scrooges, C. J.*, for a precept to the bailiff for assembling the court, shows that the bailiff is the proper person to select the jury. (a) [ABBOTT, C. J. All your argument proceeds upon this ground, that because the thing may be done in one way, it cannot be done in any other.] If the nature and jurisdiction of the court-leet are considered, it will be found that the bailiff not only *may*, but *must* select a jury. At common law it had jurisdiction over all capital offences except homicide; and although that power has been restrained by Mag. Car. c. 17., and Weston, 2, c. 13, still, if the custom here set up be good now, it must have been good before the *passing of those sta- [*58 tutes. But it cannot be reasonable that the judge of a criminal court having such ample jurisdiction, should have the power to select the jury and decide upon the challenges. [ABBOTT, C. J. The leet jury is rather in the nature of a grand jury.] Still the argument applies, unless it be supposed that

(a) See Scriven on Copyhold Tenures, &c. vol. ii. p. 839.

in former times the grand and traverse juries were returned by different persons. There could be no challenge to the array, for that can only be on the ground of unindifferency in the returning officer. Such is the consequence of the sheriff being judge in re-disseisin. Fitz. Nat. Brev. 188, n. That the bailiff is the proper officer also appears from the prior of *Montague's case*, 7 H. 6. 12 b, recognised in Rolle's Abr. 219, Y. pl. 2, and Brook's Abr., *Leet*, 14, where the charge against the defendant (a bailiff) was, not that *by custom* he was bound to return the panel, but that he was the proper common-law officer to perform that duty, and had neglected it; and in Hawk. P. C., B. 2, c. 10, s. 15, 7th edit., it is said, that the sheriff may fine the bailiff for refusing to make a panel, which would be absurd, if the bailiff were not the proper person to execute that duty. The only instances in which power is given to a judge to interfere with the nomination of a jury, are by 3 H. 8, c. 12, which enables him to re-form a panel in open court, and 1 Eliz., c. 17, s. 10, which gives power to summon a second jury to proceed instantly in case of improper conduct in the first. In re-disseisin, which has been mentioned, the sheriff and coroner are judges, not the sheriff alone. Besides, the sheriff is a public officer responsible, to the crown; whereas the steward is the creature of the lord, *59] *who is entitled to all fines and amercements. In *Wood v. Lovatt*, 6 T.

R. 511, it was decided, that a custom for the court-leet to amerce for a private inquiry done to the lord was bad, for that would make him judge in his own case. Here, the steward presides in the place of the lord; and if he could select the jury who are to make presentments and impose amercements, the lord, being entitled to them, would virtually be judge in his own case. A custom producing that effect is therefore unreasonable and void.

ABBOTT, C. J. I am of opinion that this rule must be discharged. There is not any ground for a new trial. Upon the evidence given, uncontradicted, and unexplained, I think the learned judge did right in telling the jury that it was cogent evidence, upon which they might find the issue in the affirmative. If his expression had gone even beyond that, and had recommended them to find such a verdict, I should have thought that the recommendation was fit and proper. A regular usage for twenty years, not explained or contradicted, is that upon which many private and public rights are held, there being nothing in the usage to contravene the public policy. Taking, therefore, the issue to be properly found, we must consider that by the immemorial custom of this court-leet the steward has been in the habit of pointing out to the bailiff the persons who are to be summoned on the jury. If that custom be against any known rule or principle of law, it cannot stand, however great its antiquity may be. But I am of opinion that it is not; and I adopt in a great degree what has

*60] been said respecting the ancient constitution and practice of the tourn and leet. All residents were bound to attend, and many did attend; and not till they were assembled was any jury selected. Then the sheriff in the one case, and the steward in the other, named to his officer the persons who were to be empanelled, and to serve on the jury. If it were the ancient practice to select a jury in that mode without summons, there does not appear to be any sound reason why certain persons should not be summoned to serve as jurors. Various acts of parliament have been referred to, as showing something inconsistent with this. The first of them is 11 H. 4, c. 9. By that it appears that a practice had crept in for other persons than the sheriff or bailiff of a franchise to nominate to the judges those who should serve on the grand juries, which was found very mischievous. It was therefore provided by that act, that none should serve but those who were returned to the judges by the sheriff or bailiff, without the nomination of any other person. Then came the 1 R. 3, c. 4, whereby it was enacted in sec. 1, "that if the bailiff should return or empanel to serve as jurors in the tourn any persons not having the qualification there mentioned, he should forfeit 40s.; and by sec. 2 a similar fine is imposed

on the sheriff. Now, put this case: The bailiff empanels persons not duly qualified; is the sheriff to allow them to serve, and so incur the fine, or to leave the business of the tourn undone; or, is he to select others who are duly qualified? No doubt the latter would be the proper course. Allusion has also been made to the 3 H. 8, c. 12. That statute gives power to justices of jail delivery to amend a panel precisely in the manner in which I think the sheriff ought to do in his tourn, under the circumstances before supposed. *The case of *Crane v. Holland*, which has been cited, also shows that the same person may, *by custom*, be the judge of a court for one purpose, and the officer for another. But a passage in Hawk. P. C. b. 2, c. 10, s. 15 has been relied upon as showing that the bailiff is to select the jury, because the sheriff may fine him for not making a panel. But there is nothing inconsistent in saying that it is the bailiff's duty to make the panel, although the sheriff decides upon the persons to be named in it. There is also another answer to the argument, viz., that the passage may refer to the traverse jury, and not the grand inquest. In other cases, as in writs of inquiry and re-disseisin, the sheriff nominates the jury, and presides as judge: can we then say that there is any thing in the custom now under consideration, which is at variance with any known rule or principle of law? The usual mode may be different, but that is the whole argument; and to infer thence that no other mode can be legal, is not consistent either with good logic, or good law. Upon the whole, therefore, I am of opinion that there is nothing unreasonable or illegal in this custom, which has been established by the verdict, and that the judgment ought not to be entered for the crown.

HOLROYD, J.(a) I am of opinion that the observations of the learned judge, and the verdict of the jury, were well warranted by the evidence in the cause. The remaining question is, whether the custom found be contrary to law, and therefore void. The common and ordinary course is for the bailiff to nominate the jury; *and, in the absence of any custom to the contrary, that would be held to be a part of his duty. But here it is found that a custom has immemorially existed for the steward, and not the bailiff, to nominate the jury. It appears to me that the authorities which have been cited, and the usage which has prevailed on writs of inquiry, and in some other instances, establish clearly that the custom is not inconsistent with any principle of law. The statute 3 H. 8, c. 12, giving judges the power to amend panels, shows that the legislature did not think it against the principles of law, that judges should interfere with the nomination of the persons who were to serve. Unless then some act of parliament can be found depriving the steward of such a privilege as that now claimed, it is plain that he may enjoy it. The 11 H. 4, c. 9, is the only one that at all bears upon the question; but that was intended to remedy the abuse which had been introduced of nominations by persons without any authority, and was not meant to apply to such cases as this. The latter part of it runs thus: "And that from henceforth no indictment be made by any such persons but by inquest of the king's lawful liege people, in the manner as was used in the time of his noble progenitors, returned by the sheriffs or bailiffs of franchises, without any denomination to the sheriffs or bailiffs of franchises before made by any person of the names which by them should be empanelled; except it be by the officer of the said sheriffs or bailiffs of franchises, sworn and known to make the same, *and other officer to whom it pertaineth to make the same according to the law of England.*" In this case, by the custom which existed before the time of legal memory, and therefore by the law of England, it pertained to the steward to nominate the jury. The *case of *Crane v. Holland* is, I think, decisive of the principle; for it is there held that one may be judge and officer, *diversis respectibus*. For these reasons, I am of opinion that the rule must be discharged.

BEST, J. We are not called upon to lay down any general rule in this case,

(a) Bayley, J., had left the court.

but merely to say whether the special immemorial custom found by the jury be or be not consistent with the principles of law. No direct authority has been cited to show that the custom is bad. The form given by *Scroggs, C. J.*, by which it appears that the bailiff usually selects the jury, may prove what the general practice is, but does not impugn the custom. The only other case cited at the bar, *Crane v. Holland*, is in support of the custom. It was there held, that in a corporation the bailiffs might *by custom* be both judges and ministerial officers of the court. An attempt was made to show that this case differed from that and the cases where the sheriff presides as judge, because here the lord is entitled to the fines and amercements; but that argument, if valid, would also show that the sheriff cannot properly select the jury in such cases, because he is appointed by the crown, to which the fines imposed in his court belong. So also in corporations, the fines for the most part belong to the body corporate, and yet the mayor and the corporation sit as judges in the corporate courts and impose fines. Of the statutes which have been referred to, one only appears to touch the question, and that furnishes an answer to this application. It is true that the 11 H. 4, c. 9, says, that jurors in indictments shall be returned by the *sheriff or bailiffs*, because these are the officers whose duty it is in general *64] to return them; but *this statute was not intended to prevent any other properly authorized officer from returning jurors, but only such as were not officers of the court from nominating persons to the court to serve as jurors. The 1 R. 3, c. 4, only provides for the return of jurors who were properly qualified, and makes no regulation as to the returning officer. It speaks of bailiffs and other *officers*. But the 1 Eliz. c. 17, which gives the steward of a leet a power to nominate a second jury in case of misconduct in the first, warrants us in saying that a custom for the steward to nominate the first is not unreasonable or illegal. The legislature would not have directed the steward to nominate the second jury if it had considered him as so dependent on the lord who is to receive the fines imposed in the court, as not fit to be trusted to return the jury who are to impose them. This, therefore, is a complete answer to the only objection that appears to me to be even specious. If the steward be a proper person to name the second jury, he cannot be so unfit to return the first, as to make an immemorial custom, that he is to return the jury at the leet, bad in point of law.

Rule discharged.

*65] *G. SIMSON, R. STEPHENSON, and THOMAS FREEN v. BENJAMIN INGHAM, the Heir of one JOSHUA INGHAM deceased, and the said BENJAMIN INGHAM, JOSHUA INGHAM, JAMES TAYLOR INGHAM, and Others, Devisees of the said JOSHUA INGHAM deceased.

A bond was given by country bankers to the several persons constituting the firm of a London banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the London bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the London bankers. It was the course of business between the two houses for the London bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the London bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the London bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time: *Held*, that the entries in the books of the London bankers did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it; and therefore that the London bankers, notwithstanding those entries, were entitled to apply the payments received subsequently to the death of the deceased partner to the debt of the new firm.

THIS was an action against the defendants, as heirs and devisees of Benjamin Ingham deceased, on a bond, bearing date the 19th October, 1808; whereby Benjamin and Joshua Ingham, since deceased, therein described as late of Huddersfield, bankers, became bound in the penal sum of 20,000*l.*, to one P. C. Bruce, and the three plaintiffs, Simson, Stephenson, and Freen, therein described as bankers in London, carrying on business under the firm of Were Bruce, Simson, and Co. The condition of the bond was, that B. and J. Ingham should well and truly remit and pay to the said P. C. Bruce, Simson, Stephenson, and Freen, or any of them, associated or not with any other person or persons in *the same or any firm, the amount of all such sums [66 as B. and J. Ingham, or either of them, associated with any other person or persons or not, should draw on the said Bruce, Simson, Stephenson, and Freen, or any of them, associated or not as aforesaid, or make payable at their house, as the said bills or notes should become respectively due. There then followed other clauses, usual in such bonds, for payment of all moneys paid, laid out, and expended by the London bankers, on account of the country bankers, or due from the latter to the former, upon any account whatever.

The defendants pleaded separately, and admitted the execution of the bond by Benjamin Ingham, and set out the estates which they severally took under the obligor, which the plaintiffs confessed to be accurately set out. The plaintiffs suggested breaches of the condition of the bond, and the writ of inquiry came on to be executed before the lord chief justice, at the London sittings after Easter term, 1822, when the amount of the damages was referred to Mr. Gaselee; who, by his award reciting the bond and the order of reference, assessed them at 13,845*l.*, but stated the following facts for the opinion of the Court.

The obligors are bankers at Huddersfield; the obligees their London correspondents. At the date of the bond, and from thence to the 1st January, 1809, the Huddersfield bank was carried on by the obligors alone. On that day John Ikin was taken into the firm, and it so continued until the 14th September, 1811, when Benjamin Ingham died. The two survivors carried on the Huddersfield bank till January, 1814, when Joshua Ingham died. From the time Ikin was taken into the partnership until and at the death of Joshua, the firm was *called Messrs. Benjamin and Joshua Ingham and Co. The house [67 of Bruce, Simson, and Co. was carried on by the four obligees till the 31st December, 1808, when Stephenson retired. The other three continued by themselves till the 1st January, 1811, when they took in Harry Mackenzie; and it was continued by Bruce, Simson, Freen, and Mackenzie, till after the death of Joshua Ingham. During the latter period this firm was sometimes called Bruce, Simson, and Co., and sometimes Bruce, Simson, Freen, and Co. The house of Bruce and Co. were in the habit of sending to the Huddersfield bank monthly statements of their accounts. Such statements were generally sent within the first ten or twelve days of the succeeding month; and were, on their arrival at Huddersfield, examined, and the sums ticked by a clerk of that bank, and also looked over by Ikin, to whom the Inghams chiefly left the management of the business. The last statement, sent previously to the death of Benjamin Ingham, was for the month of August, 1811, and was sent on the 11th of September, in that year. The balance of that account was 23,671*l.* 3*s.* 2*d.* in favour of Bruce and Co. On the 16th September, when the news of Benjamin Ingham's death reached Bruce and Co., the balance in their favour was 22,723*l.* 5*s.* 3*d.* On the 14th, the day on which Benjamin Ingham died, it was something less; but on the 16th had increased to the above sum by the addition of some bills for which the Inghams had had credit, and which were returned on that day dishonoured. No alteration in the account was made in the books of Bruce and Co. immediately on the death of Benjamin Ingham; but, during the residue of the month of September and a part of the month of Octo-

*68] ber, the *remittances made by the Huddersfield bank, and the payments made by Bruce and Co. on their account, were entered in continuation of the former account. The remittances and payments during that time were nearly equal, and both far exceeded the balance due at the death of Benjamin Ingham; and if by having thus continued the account Bruce and Co. are to be considered as having made an election from which they are not at liberty to depart, and bound to apply the earliest remittances in discharge of the former balance, the damages are to be only nominal. Before, however, any account was transmitted to the Huddersfield bank subsequent to that for August, Bruce and Co., in consequence of a communication with their solicitor, opened a new account in their books, and in that inserted all the remittances and payments made subsequent to the death of Benjamin Ingham, striking them out of the former account, and retaining in the old account only the bills for which, as before stated, credit had been given, but which had been returned dishonoured; and on the 13th November, 1811, they transmitted to the Huddersfield bank statements of two accounts, each of which, instead of comprising, as formerly, the transactions of a single month, contained those of two, viz., September and October, no account of September separately having been sent.

The first of these accounts was thus entitled: "Debtors Messrs. B. and J. Ingham and Co., (old account), in account with Bruce, Simson, and Co., creditors." The first item on the debit side of this account was the former balance of 23,671*l.* 3*s.* 2*d.*, and it contained the remittances and payments in September up to the death of Benjamin, and the bills returned on the 16th, making the *69] above balance of 22,723*l.* 5*s.* 3*d.* Under *this was a similar list of bills returned dishonoured in October, which increased the balance to 23,118*l.* 13*s.* The second account was in the same form, but entitled "new account," and the word Freen was introduced after Simson. This account began on the 16th September, without any balance brought forward, and contained the remittances and payments made during that month, subsequent to the death of Benjamin, and also those made in the month of October. The balance of that account, at the end of September, was 965*l.* 15*s.* 8*d.* in favour of the Huddersfield bank; but at the end of October was 242*l.* 12*s.* 7*d.* in favour of Bruce and Co. These accounts were examined and ticked in the usual manner, by the clerk of the Huddersfield bank. From this time the old and new accounts were kept separate in the books of Bruce and Co.; the addition to the former being little, if any thing, more than the interest at the end of every six months, except in the month of July, 1813, when a transfer was made from the new account to the old of 15,507*l.* 18*s.* 10*d.*, which reduced the balance of the old to 10,000*l.* Statements of these two accounts continued to be from time to time transmitted by Bruce and Co. to the Huddersfield bank, and examined and ticked in the usual manner, except that the statement of the old account was only sent at the end of every six months. The Huddersfield bank do not appear to have ever objected to the accounts being kept separately by Bruce and Co., although in their own books they only kept one account. The arbitrator being of opinion that, under these circumstances, the balance due on the death of Benjamin Ingham was not wholly discharged, assessed the damages *70] at the sum above awarded; but if the Court should be of opinion that *the damages ought only to be nominal, then he directed that they should be reduced to the sum of one shilling. Upon the motion for a rule to reduce the damages to one shilling, in last Michaelmas term, the Court ordered that the award should be turned into a special case.

Campbell, for the plaintiffs. The remittances after Benjamin Ingham's death having been made generally, the plaintiffs had a right to appropriate them to the debts contracted by the new firm. In *Clayton's case*, 1 Merivale, 572; *Bodenham v. Purchas*, 2 B. & A. 39, and *Brooke v. Enderby*, 2 B. & B. 70; the expressions of the judges have reference to the fact of there having been one

continuous account for all transactions before and after the change of the firm. This is evidence of the party receiving the money having applied it to the payment of the earliest items of the account. But it is impossible to contend, that a rest may not be made and a new account opened. The deceased or retiring partner may be indebted to the partnership, and there can be no right that the old debt should be satisfied by money of the remaining partners. The question, here, must therefore turn upon the effect to be given to the entries in the plaintiffs' books before the new account was opened. But these entries never having been communicated, would have been no evidence of an appropriation for the plaintiffs themselves, and are to be considered as of no validity with respect to others. *Manning v. Western*, 2 Vern. 607; *Cox v. Troy*, 5 B. & A. 474. The meaning of an appropriation by the receiver at the time of payment is, that he shall appropriate on the first *occasion of there being any [*71 communication between him and the payer, and this course was here pursued; for in the first account rendered after Benjamin Ingham's death, the subsequent payments were appropriated to the new debt, and the old debt remains unsatisfied. He was then stopped by the Court.

F. Pollock, contrâ. The London bankers were bound to apply the payments at the time of receiving them. That is expressly laid down by the master of the rolls in *Clayton's case*, 1 Mer. 604. After observing that the rule with regard to the option given in the first place to the debtor, and to the creditor in the second, was taken from the civil law, he proceeds to state, that according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor; and he then cites the words of the civil law, "in re presenti; hoc est statim atque solutum est: cæterum postea non permittitur." Dig. lib. 46, tit. 3, qu. 1, 3. The rule laid down refers to an act of appropriation to be done either by the party paying or receiving the money. The party paying money is bound to communicate his intention, that it shall be applied in payment of a particular debt to the party receiving it; for otherwise the right of appropriation would devolve upon the creditor. The very act of communicating the intention is the act of appropriation. But where a creditor receives money without any appropriation by the debtor, the right of applying it in payment of any one of several debts devolves on the former. The appropriation is an act to be done by him only, and it is unnecessary that it should be *communicated to the debtor: for the latter not having made [*72 his election in the first instance, has no right to dissent from the appropriation made by the creditor. Here, therefore, the London bankers did, at the time of receiving the several payments, make the appropriation by entering them in their own books to the account of the old firm. The making of these entries constituted the act of appropriation; and having once done that act, they had no right to make any alteration in the account, especially to the prejudice of the heirs and devisees of B. Ingham, who are mere sureties for any debts contracted by the new firm since his death.

BAYLEY, J.(a) The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case, it is to be presumed that all the parties have consented that it should be considered!

(a) Abbott, C. J., was absent.

as one entire account, and that the death of one of the partners has produced no alteration whatever. In this case the *partner died in September, *73] 1814. If, in the ordinary course of business, in October, 1814, a monthly account had been sent in, stating the transactions before and after the death of the partner as forming part of one entire account, and the balance as due from the survivors; in that case the creditor would have been precluded, and would have had no right to have said that the payments made subsequently to the death of the partner should be applied to any but the old account. In fact the bankers in London did not send in any account after the death of the partner until November, and then they sent in two distinct accounts; one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in London expressed their dissent from making the whole one entire account. It has been insisted that, at that period of time, they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit. For these reasons I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and therefore that this award is right.

*74] *HOLROYD, J. I am also of opinion, that in this case the award is right. The persons paying the money not having made any direct application of it, the right of making such application devolved on the receivers; and if they have done no act which can be considered as such an application, it is equally clear, that although they did not apply it at the moment of payment, they would have a right to make the application at a subsequent period. The question therefore is, whether from any entry in the books there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been actually delivered. Now, those entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books, shows only that the idea of so applying the payments had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect. In the case of *Cox v. Troy*, a party who had written his acceptance with the intention of accepting a bill, afterwards changed his mind, and before it was communicated to the holder, or the bill delivered back, obliterated his acceptance; and it was held that the acceptance was not complete. That case is very similar to the present; for the drawer of the bill there, by writing his acceptance on it, had expressed an intention to accept, yet it was held not to be a complete acceptance until it was communicated to the holder. So in this case, the entries made in the bankers' books could not amount to an election by them to *75] appropriate the *sums to a particular account until those entries were communicated to the opposite party. That being so, I am of opinion that the bankers are not bound by those entries; and therefore that the award is right.

BEST, J. *Clayton's case* is altogether unlike the present. He had money in the banking-house at the time of Devaynes' death and afterwards paid in more money, which was blended in the same account. It was on the ground that the accounts were so blended that the master of the rolls decided that case. He thought there was no other appropriation than what arose from the order

in which the receipts and payments took place, and according to that order, the money lodged in the house in Devaynes' lifetime was first paid. In this case, the payments after the death of Benjamin Ingham are appropriated by the rendering of the accounts, in which credit is given for them to the surviving partners, from whose hands these payments came. But it is said that this application of the money was made too late, and after the plaintiffs were precluded from so applying them, by their having previously entered them to the credit of the old firm. It is true that Sir WILLIAM GRANT says, in *Clayton's case*, that, by the civil law, the application is given first to the debtor, and then to the creditor, and that as well the creditor as the debtor must make his election at the time of payment; and that unless such election be immediately made, the law will appropriate it in discharge of the most burdensome, and if all are equally burdensome of the oldest debts. But according to the cases there cited, our law does not require from the creditor an instant decision. I think that he has a reasonable time *to decide, to which account he will place a sum that has been paid him without any application of it by his debtor, and more than a reasonable time has not been taken by the plaintiffs. When once the creditor has made his election, he is bound by it. For the reasons given by my brothers, I think no election was made until the account was rendered to the Huddersfield bankers, and consequently that the award is right.

Judgment for the plaintiffs.

COLEGRAVE v. DIAS SANTOS.

The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house: *Held*, that they passed by the conveyance of the freehold; and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them. A few articles, which were not fixtures, were also left in the house; the demand described them together with the other articles, as fixtures, and the refusal was of the *fixtures demanded*: *Held*, that upon this evidence the plaintiff could not recover them in this action.

TROVER for stoves, grates, kitchen-ranges, closets, shelves, brewing-coppers, cooling-coppers, mash-tubs, locks, bolts, blinds, &c. Plea, general issue. At the trial before ABBOTT, C. J., at the Westminster sittings after last Michaelmas term, the following were proved to be facts of the case. The plaintiff being the owner of a freehold house and estate, advertised them for sale, and printed particulars were circulated, which took no notice of the articles enumerated in the declaration, which were then in the house. The defendant became the purchaser, the house and estate were conveyed to him, and possession given, those articles still remaining in the house. The plaintiff afterwards desired that a valuation of them should be made, and that defendant should pay for them according to it; the latter contended that they passed to him, together with the *freehold, and refused to pay for them or deliver them up. The plaintiff demanded all the articles *as fixtures*; and in his particulars delivered under a judge's order, described them *as fixtures*; and the refusal was of "the fixtures demanded." The lord chief justice thought that some of the articles clearly passed by the conveyance of the freehold; but that others of them, viz., the stoves, cooling-coppers, mash-tubs, water-tubs, and blinds, were removable as between landlord and tenant, and that the plaintiff might recover for them. The value of those articles was proved to be 50*l.*, and the plaintiff had a verdict for that sum, the defendant having leave to move to enter a nonsuit. A rule was accordingly obtained for that purpose, against which

Marryat and *Platt* now showed cause. The question is, whether all those articles which were in the house, and belonged to the seller of the estate, necessarily passed to the purchaser by the conveyance of the estate. They may be divided into three classes. The first of which being clearly fixed to the free-

hold, must be admitted to have passed; the second class, consisting of fixtures, commonly so called, but removable as between landlord and tenant, and the third, consisting of a few articles, not fixtures in any sense, remained the property of the plaintiff, and he is entitled to retain the verdict which was taken for the value of those articles. The conveyance must be construed to apply to the freehold only; *Ex parte Quincy*, 1 Atk. 477; which case also shows that trover will lie for such articles as brewing utensils. [BAYLEY, J. The general rule relating to the right to fixtures, is that between the heir and executor; and, *78] as between them, the second class of articles would belong to the heir: all the other cases as to landlords and tenants, and execution creditors, are mere exceptions in favour of trade.] At all events the plaintiff is entitled to a verdict for something; for a few of the articles, viz., mash-tubs water-tube, &c., were not fixtures, in any sense of the word.

Gurney and Stokes contra were stopped by the Court.

ABBOTT, C. J. I am of opinion that this rule must be made absolute. This was the case of a freehold house sold by auction. Printed particulars were circulated, and in them no mention was made of the vendor's right to the articles in the house. The usual course is to say that the fixtures shall be taken at an appraisement, or at a valuation to be made in some appointed mode; but here nothing at all was said respecting them. After the auction a conveyance was executed, the purchase-money paid, and the defendant put into possession, all the articles which form the subject of the present action being still left in the house. The rule of law is most strict between the heir and executor. According to that rule, the articles in the two first classes mentioned by the plaintiff's counsel, would be considered as parcel of the freehold. If they are so, why should they not pass by a conveyance of the freehold, when there is nothing to indicate a contrary intention? But another important question arises, viz., whether the vendor can now maintain trover for those articles, even on the supposition that he might have removed them after the sale but before possession was given to the purchaser. In *Lee v. Rindon*, 7 Taunt. 188, GIBBS, *79]

C. J., says, speaking of the power which tenants have to remove fixtures, "Unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it; and it never, I believe, was heard of, that trover could be afterwards brought." According to that opinion, nothing can now be done with respect to those things which may be considered as fixtures, whatever power the plaintiff might have had before he gave up the possession. There may, perhaps, have been in the house three or four trifling articles which were not fixtures, and the plaintiff insists that he is entitled to a verdict for them. But I think that he is not. Upon the evidence given at the trial, it appeared that they were included in a long list, together with many other things. The whole were demanded as fixtures, and the defendant refused to deliver the fixtures demanded. The plaintiff should have made a specific demand of those articles if he intended to rely upon them as distinguished from fixtures.

BAYLEY, J. If we were obliged to support the verdict which has been found for the plaintiff, we should be obliged to do great injustice. It is assumed that the fixtures were not intended to pass by the conveyance of the house. But there is nothing to prove that; and on the contrary, I think that as nothing was said about them at the time of the sale, the plaintiff has no right to make this claim. In the case of an heir selling a house which descends to him, in the absence of any express stipulation, he would be taken to sell it as it came to him, and the fixtures would pass. If the plaintiff may now insist upon payment of these fixtures, he might also after the sale of the house have refused to *80] sell the fixtures, and might have done great injury to the house by taking them away. He should have insisted upon his right before the conveyance was executed. It is quite clear that the major part of the articles were so far fixtures as not to be the subject of larceny; but it is suggested that

some of them were not fixtures. As to them I should be disposed to say, that if the seller gave up the estate with those things upon it, he must be considered as throwing them into the bargain. But at all events, in order to maintain this action, he should have made a specific demand, instead of including them amongst other things claimed generally as fixtures.

BEST, J. Where a stipulation is made that fixtures are to be taken at a valuation, that shows that they are not otherwise to pass. So of timber, if there be a provision that it shall be valued; if there be not, the wood passes with the land, and the fixtures with the house. In the absence of authorities, I should hold, that every thing which forms part of a house passes by a sale and conveyance of the house itself. If it descends, fixtures pass, so also if it be devised; why then should they not in the case of a purchase? But it is unnecessary to decide upon that ground, for there has been a delivery of possession as well as a conveyance; and we have the authority of GIBBS, C. J., in *Lee v. Risdon*, for saying, that under such circumstances trover will not lie. As to the other point, all the articles were described as fixtures in the demand; and it would be unfair, under a demand of fixtures, to admit evidence of things which were not fixtures. The refusal, also, was of the *fixtures demanded*. I am, therefore, clearly of opinion, that a nonsuit must be entered.

Rule absolute.(a)

(a) Holroyd, J., had left the court.

MERINGTON v. BECKET, Gent., one, &c.

[*81]

The Court will not compel a defendant to verify his plea.

ASSUMPSIT for goods sold. Defendant pleaded a sham plea, precisely similar to that pleaded in *Richley v. Proone*, 1 B. & C. 286; and upon the authority of that case a rule nisi had been obtained, that the plaintiff might be at liberty to sign judgment, as for want of a plea, upon an affidavit stating that the plea was in every respect false. And now, after hearing *Comyn*, in support of the rule, and *Langlow*, contra, the Court said that it was very desirable that the proceedings should not be productive of unnecessary expense and delay; but that it was equally important that that object should be effected without breaking in upon any established principles, which would be the case if a defendant were to be compelled to verify his plea. If that might be done, the Court might be called upon to grant a rule to compel the plaintiff to verify, by affidavit, his cause of action. The truth of a plea of release had been inquired into, because a court of equity would entertain the question; and this Court only does that in a less expensive way. The case of *Richley v. Proone* was decided upon the authority of what fell from Lord Holt, in *Peirce v. Blake*, 2 Salk, 515. That case, however, is only an authority to show that an attorney who puts a false plea upon the record may be fined; and if the defendant had not been an attorney, the Court might perhaps have granted a rule, calling upon the attorney to show cause *upon what grounds he put the plea upon the record; and if he had not shown sufficient grounds, he might have been fined for his im- [*82] proper conduct: but it would be going too far to treat the plea as a nullity, unless the defendant verified it. On a subsequent day the lord chief justice said that calling upon the attorney to show by what authority he put a sham plea upon the file, might not be effectual, and that the Court would consider whether some means could not be adopted for the prevention of sham pleading, without breaking in upon any established principle. In the mean time, however, until some such regulation could be devised, the practice must remain as it had been heretofore.

Rule discharged.

MURRAY, Administrator of W. MURRAY, deceased, v. The Earl of STAIR.

A subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution, it was agreed that it should remain in his (the subscribing witness') hands until the death of A. B., and until certain securities were given up, and that the bond was given up to him upon that condition: *Held*, that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B., and until the notes are delivered up.

Scamle, That it is not essential in order that an instrument should operate as an escrow only, that it should be expressly declared at the time when it is executed, that it was not to operate as a deed until a given event happened.

It is not necessary in a declaration upon a post obit bond, to aver the death of the person upon whose death the money secured by the bond was to become payable.

A post obit bond (upon which a forfeiture has taken place) is not within the statute of the 8 & 9 W. 3, c. 11; and therefore it is unnecessary to suggest breaches.

Scamle, That such a bond is within the 4 & 5 Anne, c. 15.

DECLARATION on a bond, bearing date the 3d November, 1813, given to the deceased in the penal sum of 4000*l*. Plea, craving oyer of the bond, and of the condition, which was for the payment to William Murray, his executors, &c.,

*83] of 2000*l*., by John William *Henry Dalrymple, within six calendar months after the decease of his kinsman, John Dalrymple, Earl of Stair. The plea then stated that the bond was, on the 3d November, 1813, delivered by the defendant to W. Saunders, the subscribing witness thereto, merely as an escrow, on the condition that the same should remain in the hands of the said W. Saunders until the decease of the said J. Dalrymple, Earl of Stair, and that then and then only the bond should be delivered to the said W. Murray; that the said writing obligatory accordingly remained in the hands and possession of the said W. Saunders, from the time of the delivery thereof to him the said W. Saunders as aforesaid for a long time, and until he the said W. Saunders, before the decease of the said John Dalrymple in the condition mentioned, to wit, on the 10th March, 1819, wrongfully parted with the possession thereof, and the same thereby wrongfully came into the hands and possession of the said W. Murray; and so the defendant saith that the said writing obligatory is not his deed, in manner and form as the plaintiff hath alleged. Second plea, that it was delivered as an escrow, on condition that the same should be delivered up to the said W. Murray, in case two promissory notes for 1000*l*., then outstanding, should be delivered up to W. Saunders, to be cancelled; and that the said last-mentioned notes have not, nor hath either of them, been delivered up to the said W. Saunders for the purposes aforesaid, or otherwise. Upon these pleas issues were joined. At the trial before ABBOTT, C. J., at the Middlesex sittings after Trinity term, 1822, W. Saunders, the subscribing witness, proved the execution of the bond, and also gave in evidence the following facts. He

*84] acted as the attorney of the *defendant when the bond was executed. At that time Murray, the intestate, held two promissory notes of the defendant's, and had threatened to put them in suit. The defendant, in consequence, proposed to give the intestate the bond in question, but desired that it should not go into the market before the death of Lord Stair, as that might have the effect of creating a prejudice in his mind to defendant's disadvantage. It was agreed by all the parties, before and at the time of the execution of the bond, that it should remain in Saunders' hands until the death of Lord Stair, and that it should not even then be delivered up to Murray until he gave up the notes, and the defendant would not have given the bond unless that had been assented to. The bond, however, was attested, sealed, and delivered in the usual way, and no other than the words usual on the execution of a bond were used by the defendant when he executed the bond in question. In 1812 Saunders had been a surety for the wife of the intestate, upon her taking out letters of administration; and he desired an indemnity to protect himself, and he kept the bond in question partly for his own security. Some weeks after it had

been executed, Murray, the intestate, told Saunders that his, Murray's, wife had misapplied some money belonging to the estate, and observed at the same time, that he, Saunders, was indemnified, for he held Lord Stair's bond. John Lord Stair died in June, 1821, and the defendant then succeeded to the title; Saunders, however, in the beginning of 1819, at Murray's request, had delivered the bond over to him for the purpose of depositing it with his woollen-drafter, as a security. Upon cross-examination, he stated that the bond was executed upon the express condition that it *was to remain in his hands until the death of Lord Stair, and until the notes were delivered up. Upon this evidence [85 it was contended, that the plaintiff ought to be nonsuited, inasmuch as it appeared to be the intention of the parties that the instrument should not operate as a deed until the death of Lord Stair; and *Johnson v. Baker*, 4 B. & A. 440, was cited. The lord chief justice reserved the point, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained in last Michaelmas term,

The *Solicitor-General*, Gurney, and Comyn, in Easter term showed cause. The defendant delivered the instrument as his deed, and it took effect as a deed from the moment of such delivery. In order to make it operate as an escrow, the defendant ought, at the time of the execution, to have said that it was to become his deed only upon the death of Lord Stair, and upon the delivering up of the two notes; but having delivered it as his deed, with a request to Saunders to keep it till the notes were delivered up, it operates as such from the moment of its delivery. This distinction is pointed out in Sheppard's Touchstone, 58. The learned author, after defining an escrow, states "that it is essential that the form of words used in the delivery of such an instrument should be apt and proper, as, for example, I deliver this to you as an *escrow* to deliver to the party as my deed, upon condition that he do deliver to you 20*l.* for me, or upon condition that he deliver up the old bond he hath of mine for the same money, (or as the case is), or I deliver this to you as an escrow, to keep until such a day, upon condition that *if before that day, he to whom the escrow is made shall pay to me 10*l.* or give me a horse, or enfeoff me of the [86 manor of Dale, or perform any other condition, that then you shall deliver the escrow to him as my deed. But if when the deed is delivered to the stranger, I use these words 'I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions; or to deliver to him to whom it is made when he comes to London,' in this case the deed takes effect presently, and the party is not bound to perform any of the conditions." This is an authority to show that the intention that an instrument should operate as an escrow, should be clearly expressed at the time of execution. (a) But assuming that not to be necessary, it sufficiently appears from the whole of the evidence to have been intended that this should operate as an effective deed from the moment of its execution. It was given to prevent two other effective securities from being put in force against the defendant. It was left in the hands of Saunders, his own attorney, in whom he had a special confidence; and Murray the deceased understood it to be a valid security, for he told Saunders that he was secure against any claims that might be made upon him, as he held Lord Stair's bond.

Scarlett, (and *Marryat* and *Lawes* were with him) contra. The question is, whether the defendant intended this instrument to operate as a deed from the moment of its execution, or only upon Lord Stair's death and the delivery up of the notes. Now it appears from the evidence of Saunders, who was called as a witness on the part of the plaintiff to prove the execution *of the bond, that it was agreed both before and at the time of the execution, that it should [87 remain in the hands of him, the defendant's attorney, until the death of Lord Stair, and until the notes were delivered up; and that unless that had been assented

(a) See further as to the delivery of an instrument, as an escrow or deed, Vin. Abr. *Fait*. (M: Co. Lit. 36.

to by Murray, the defendant would not have given the bond; and in his cross-examination, Saunders stated that it was delivered upon that express condition. He was then stopped by the Court.

ABBOTT, C. J. Upon further consideration, we are all of opinion that there ought to be a new trial in this case, and that it should be presented as a question of fact for the jury upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of such delivery, or whether it was delivered to Saunders upon the express condition that it was not to operate as a deed until the death of the then Lord Stair, and then only upon the delivering up of the two promissory notes. The jury must draw their conclusion from the whole of the evidence given by Saunders; and it will be competent to either party who shall be dissatisfied with my direction to tender a bill of exceptions, and the question may be raised upon the record, whether an instrument can in any case operate as an escrow, unless the party at the time of its execution uses express words to show his intention that it should not operate as a deed until a given event happen. Rule absolute for a new trial.

The cause was tried again at the sittings after Easter term; and Saunders having given nearly the same evidence, the lord chief justice told the jury that *88] "if the instrument was delivered as the deed of the defendant binding on him at the time, although it was delivered on the faith and confidence which he reposed in Saunders his attorney that he would not part with it until the death of Lord Stair, and until the notes were delivered up, that it immediately became the defendant's deed, and although Saunders in fact parted with it before Lord Stair's death, and before the delivering up of the two notes, in violation of the trust reposed in him, it was still the defendant's deed in a court of law, whatever relief he might obtain in a court of equity; that it was like the common case where a conveyance is executed before the consideration money is paid, and the deed is left in the hands of the attorney until it is paid, although the attorney parts with it before payment, there is no relief at law. But if the delivery itself at the time was conditional, so as not to constitute any present obligation, it was an escrow or writing merely, and not a deed; and the condition of the delivery having been broken, it had never become the deed of the defendant. To make the delivery conditional, it was not necessary that any express words should be used at the time. The conclusion was to be drawn from all the circumstances. It obviated all question as to the intention of the party, if at the time of delivery he expressly declared that he delivered it as an escrow; but that was not essential to make it an escrow. After these observations his lordship told the jury to find a verdict for the plaintiff, if, upon the whole evidence, they thought it was delivered as the deed of the defendant, binding at the time; and for the defendant, if, on the contrary, they were of opinion that the delivery itself was conditional, so as not to constitute a present *89] obligation. The jury having found a verdict for the plaintiff a rule nisi was obtained in this term for arresting the judgment, on the ground that the death of Lord Stair mentioned in the condition was not averred; and secondly, that the plaintiff ought to have assigned breaches according to stat. 8 & 9 W. 3, c. 11, s. 8.

Comyn was now heard against the rule, and *Scarlett, Marryat*, and *E. Lucas*, in support of it.

As to the first point, the Court, during the argument, intimated their opinion that an averment of the death of Lord Stair was wholly unnecessary, inasmuch as the condition of the bond set out in the plea contained that which was matter of defence if the event had not happened, the defendant might therefore have pleaded it; but he not having done so, the plaintiff was not bound to show the death of Lord Stair. *Meredith v. Alleyn*, 1 Salk. 138; *Lockey v. Darby*, 1 L. Raym. 108. And HOLROYD, J., said that in the common case of a bond

conditioned for indemnifying, if the defendant sets out on oyer the condition of the bond, he must plead non damnificatus, in order to make the plaintiff show a damage. Upon the other question, whether it was necessary to suggest breaches upon the record, Tidd's Practice, 604, *Wardell v. Fermor*, 2 Campb. 282, and *Cadoza v. Hardy*, 2 B. Moore, 220, were cited on the part of the plaintiff. For the defendant it was said, that in *Cadoza v. Hardy* it did not appear upon the record that it was a post obit bond but the question merely was, whether there should be judgment for want of plea; and it was said that the statute of the 8 & 9 W. applied to all bonds upon the face of which it did not appear that any thing, and how much was due; and they cited *Walcot v. Goulding*, 8 T. R. 126; *Willoughby v. Swinton*, 6 East, 550; *Welch v. Ireland*, 6 East, 513; *Ex parte Winchester*, 1 Atk. 118; *Middleton v. Bryan*, 3 M. & S. 156. [*90]

ABBOTT, C. J. I am of opinion that this bond does not come within the operation of the 8 & 9 W. 3, c. 11, s. 8, by which it is enacted, "that in all actions upon bonds or on any penal sum for non-performance of any covenants or agreements in any deed or writing, the plaintiff may assign as many breaches as he shall think fit." The statute then goes on to direct that the jury are to assess the damages for the breaches so assigned; and if the defendant pay into court the damages so assessed by reason of the breaches of the covenant, together with the costs of the suit, a stay of execution is to be entered upon the record, but the judgment is to remain as a further security to answer to the plaintiff such damages as may be sustained by further breaches of covenant. The words of this statute are large and somewhat obscure. It is now, however, fully established by decided cases, that bonds for the payment of annuities, or of money by instalments, are within the statute; but that bonds for the payment of a sum certain, at a day certain, are not within it. Bonds for the payment of annuities are clearly within the provision, that the judgment shall stand as a security for future payments. Before the statute a court of equity could only put a value upon the annuity, but could not effect that which is now done by the statute. A bond for the payment of a sum certain, at a day certain, is not within the statute of William, for in order to ascertain the precise sum due in such a case, computation only is necessary, and the *intervention either of a jury, or a court of equity is unnecessary. This is a bond [*91] for the payment of a sum certain, at a time that may be rendered certain, and which, upon this record, must be taken to have been rendered certain by the happening of the event contemplated by the condition. And although the day be not mentioned in the condition, yet being ascertained by the happening of the event, nothing but computation was necessary in order to ascertain the precise sum due. That being so, I think that this is a bond for the payment of a sum certain, at a day certain, and therefore not within the statute of William. It is not necessary to decide whether it be, or be not within the 4 & 5 Anne, c. 16; but I am strongly of opinion that it is. The judgment of Lord HARDWICKE in *Ex parte Winchester*, 1 Atk. 118, is an authority against that position. In *Wyllie v. Wilkes*, Doug. 519, however, Lord MANSFIELD seems to have disapproved of what fell from Lord HARDWICKE upon that occasion, and it appears that the judgment in *Ex parte Winchester*, went farther than was necessary. In that case the father of the wife had given a bond to the husband to pay him the principal sum of 1000*l.* after the death of himself and his wife, and interest at 4 per cent. by half yearly payments in the mean time; and it appeared that half a year's interest had become due at Christmas, and was not paid till the 10th January, and therefore that the bond had become forfeited. The obligor and his wife were still living; it seems, therefore, that the principal had not become due at all, and consequently the day of payment of that sum had not been ascertained by the happening of the event mentioned in the condition. Tha'

-92] bond was clearly not a bond within the statute of 4 & 5 Anne, *c. 16. In this case the principal had become due by the happening of the event; and I think it clearly a case within the statute of 4 & 5 Anne, c. 16, and that it would have been competent to the defendant to have pleaded that the money due had been tendered before the action was brought.

BAYLEY, J. I am of opinion that this falls within the case of *Cadoza v. Hardy*, and that that case was properly decided.

HOLROYD, J. I am of the same opinion. The stat. of 8 & 9 W. 3, c. 11, s. 8, seems to have contemplated bonds by the condition of which more than one act was required to be done; for it directs that the judgment shall be for the penalty, but that execution shall be for the damages assessed only, and that the judgment shall remain as security for further damages that might occur. The main object of the legislature was to make it unnecessary for parties to go into a court of equity to obtain relief. Now, where the penalty was a security for the doing of several acts, it became the debt at law by the non-performance of any one. And it was necessary therefore for a party to apply to a court of equity for relief, which was granted upon the terms of paying what was due in conscience. Now, in this case, only one act was to be done—the payment of the sum of 2000*l.* six months after the death of Lord Stair; and before the statute there could be no ground for seeking relief in a court of equity against the payment of that sum. I do not, however, mean to pronounce my judgment upon the ground that the statute of William was not intended to apply to any case but where one thing is required to be done by the condition of the bond;

*93] for it is perfectly clear that if this bond be within the 4 & 5 Anne, c. 16, it is not within the statute of 8 & 9 W. 3, c. 11. Now I think this a case both within the words and spirit of the statute of Anne. The 12th section of that statute enacts “that where an action of debt is brought upon any bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, before the action brought, pay to the obligee the principal and interest due by the defeasance or condition of such bond, although such payment was not made strictly according to the condition or defeasance, yet it shall be pleaded in bar of such action, and shall be as effectual a bar to such action as if the money had been paid at the day and place, according to the condition or defeasance, and had been so pleaded.” It is said that this is not within that section of the statute, because the money is not made payable by the condition at a day certain. Now it must be taken upon these pleadings, that the death of Lord Stair had happened before the commencement of the action, for otherwise no action could have been maintained. That being so, the day of payment had become certain, according to that maxim of law, “*id certum est quod certum reddi potest*,” Therefore this action was brought upon a bond which, at the time of the commencement of the action, had a condition to make void the same upon payment of a lesser sum at a day certain. It falls therefore within the very words of the 12th section of the statute. The 13th section then enacts “that if at any time pending an action upon such bond, the defendant shall bring into court all the principal and interest due on it, and also such costs as have been expended in suits at law

*94] or in equity, the money so brought in shall be a full discharge of the bond. Now the defendant, after the commencement of an action upon this bond, might have paid into court the principal, and interest, and costs, for they were the subject of computation. This is therefore a bond within the meaning of that section. The mischief contemplated by the statute was that where a bond was conditioned for the payment of a lesser sum at a day certain, and payment was not made at the day, the penalty became the debt at law; and payment after the day could not be pleaded in a court of law in bar of the action; and even pending the action, the payment of the principal, and interest, and costs, would not be a ground for discontinuing it, but the obligor of the

bond was driven to a court of equity. Here, before the statute, the obligor would have been obliged to apply to a court of equity for relief if he had not paid the money at the day. This is therefore clearly a bond within the mischief contemplated by the legislature.

BEST, J. I am clearly of opinion, both upon authority and principle, that this case is not within the statute of the 8 & 9 W. 3, c. 11. That statute is highly remedial, and calculated to advance justice and to give relief to plaintiffs up to the extent of the damage sustained, and to protect defendants from the payment of more than what is justly due, and ought not to be so construed, as to compel plaintiffs to put unnecessary matter on the record. It appears to me that a suggestion is required in two cases; first, where upon the first breach, all that may become due is not payable, as in the case of an annuity or money payable by instalments, and then justice requires that the party should recover only what is due, which cannot be ascertained without a suggestion. The second case is where the damages are unliquidated, and must be ascertained by the verdict of a jury, as in cases of breaches of covenant. In this case, the whole sum that the plaintiff could ever become entitled to, became due at one time. There was no occasion, therefore, to summon a jury to assess the damages; they were the subject of computation only. [*95]

Rule discharged.

v. JOHNSON.

Where a latitat has by mistake been served upon a wrong person; the right person may afterwards be served with an alias issued upon it.

LATITAT issued against Thomas Johnson was, by mistake, served on his father, J. Johnson, who lived in the same house. The plaintiff's attorney inquired for common bail, and a person in the office said it was filed. A declaration was then delivered against T. J. The attorney returned it, saying that he had appeared for J. J. sued as T. J. Plaintiff's attorney said he had no action against J. J., and sued out an alias and pluries against T. J., who was served with the pluries.

Comyn moved to set aside the writ, and contended, that having been served on J. J. it was functus officio, and therefore no alias could be sued upon it.

Patteson, contra, contended that the service upon J. J. was altogether a nullity, and that the latitat was not in any way affected by it.

BAYLEY, J.(a) The service of the latitat upon a wrong person by mistake was the same as no service at all. The writ was not affected by it, and consequently the alias and pluries were good.

Rule discharged.

(a) The only judge in court.

*HARDING v. WILSON.

[*96

Where a lease of premises described them as abutting on "an intended way of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an underlease was granted, describing the premises as abutting on "an intended way," not mentioning the width: *Held*, that the underlessee was entitled to a convenient way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained. The underlease was of premises "together with all ways thereunto appertaining." A right of way over the original lessor's soil would not pass by those words. Per HOLROD, J.

CASE. The declaration stated that the plaintiff was possessed of a dwelling-house, and, by reason thereof, was entitled to a way from a common highway to his house, for horses, cattle, carts, and carriages; and that defendant obstructed the way by building a wall upon it. Plea, not guilty. At the trial before ABBOTT, C. J., at the Westminster sittings after last Michaelmas term

the following evidence was given. In August, 1809, a lease of a piece of ground was granted by one Sloane to W. Bolton; the abuttal on one side was described as "an intended way of thirty feet wide." The ground over which the way was to be made also belonged to the lessor. In 1811, Bolton underlet to plaintiff's landlord (one Pittard) a part of the ground so demised, "together with all ways thereunto appertaining;" and it was described as abutting "on an intended way," without mentioning any width. Pittard built a house upon it, of which the plaintiff was tenant. In 1820, the defendant purchased the ground on the opposite side of the "intended way" mentioned in the first lease, and also the soil of that way, and built a wall, leaving a road only twenty-seven feet wide in front of the plaintiff's house. When the two leases above mentioned were made, the road had not been set out, but there had been a road thirty feet wide for about four years before the alleged injury was committed. It did not appear that the plaintiff had sustained any actual injury from the erection of the wall, the road being wide enough for carriages to pass and turn round. The lord chief justice observed, that the plaintiff had not a *97] grant of a way of any particular width, and left it to the jury to say, whether, under those circumstances, the wall was a nuisance. The jury found a verdict for the plaintiff, with nominal damages; and in Hilary term a rule nisi for a new trial was obtained, against which

Gurney and *Andrews* now showed cause. The plaintiff's landlord was entitled to a way thirty feet wide. The first lease described the intended way as thirty feet wide; and the second lease, speaking of "the intended way," must have meant one of that width. No doubt the first lessee was entitled to a way thirty feet wide, and his under-tenant had the same rights. At all events, the question, whether the wall were or were not a nuisance, was properly left to the jury; and although according to the evidence it was possible for a carriage to turn round upon the road, still they were warranted in finding that it was not so commodious as before the wall was built. That was properly a question for them, and there is no reason to disturb their verdict.

Scarlett and *Littledale*, contra. The lease to Pittard did not contain any grant of a way of a particular width. The property is described as bounded by an intended way, not saying how wide that was to be. There was no privity between the under-tenant and the original lessor so as to entitle him to all the privileges granted by the first lease; and even if there were the description in that, it does not amount to a grant of a way thirty feet wide. At the utmost, it would only amount to a covenant by Sloane to Bolton to make a way of that *98] width; and until the way was set out, the party could only have a right to a convenient way. Although the way may at one time have been thirty feet wide, still the plaintiff must fail unless he can show a grant; for his possession has not been long enough to warrant the presumption of one. It must be admitted that he is entitled to a convenient way, and accordingly his declaration claims generally a right of way for horses and carriages; and the evidence fully established that he has a convenient way for them, notwithstanding the erection of the wall. If Bolton was entitled to a way of thirty feet wide, no doubt he might abridge that right in an under-lease; and here he did so, by using the words "intended way," without specifying any width. If the plaintiff had in this instance the right which he claims, all under-tenants must be entitled to every privilege contained in the original lease.

Abbott, C. J. It appeared by the evidence at the trial, that the road now left in front of the plaintiff's house was as wide as convenience required, and that the plaintiff himself had declared that he sustained no inconvenience from the erection of the wall. His landlord, however, has a right to sue in his name; but as no injury has been sustained, cannot recover unless he establishes his right to a road of a particular width. Adverting to the lease from Sloane to Bolton, the former does not grant a way thirty feet wide, but only describes the

land demised as bounded by an intended way of that width. That is merely an expression and declaration of an intention. If, indeed, that operated as a grant, the plaintiff's right might possibly have been made out; but if it was not a grant, a departure from the intention expressed will not give a right of action, unless some actual damage has been sustained. Here ^{the evidence} ^{negated any such damage.} I am therefore of opinion that there ought to be a new trial. [*99]

BAYLEY, J. I am of opinion that this question depends upon the construction of the original lease. Bolton had a right to some way, and he might have bargained for a road of a particular description. Without any express stipulation the law would give him a way of necessity, for the convenience of the houses which were to be built. In this case there was not any express stipulation as to the width of the way, but the abuttal was described as an intended way thirty feet wide. That was merely the intention of the owner of the soil. He does not expressly engage that the road shall be of that width. It was his intention to make it so at the time; but he uses no words which could fetter his intention, and prevent a deviation from it, provided a convenient way was left for Bolton, and his under-lessees.

HOLROYD, J. The plaintiff's claim, as stated in his declaration, is of a right to pass and repass on foot and on horseback, and with cattle, carts, and carriages. He does not specify the particular width of the way; but the declaration would be sufficient, provided he proved a title to a way thirty feet wide. The ground on which the plaintiff's messuage is built, and the road also, originally belonged to Sloane. When he demised it, the party renting would have no right of way but such as was incident to the lease, or such as was expressly given. Upon the evidence, it appears that he still has a convenient way. But the plaintiff says that by the lease, a way thirty feet wide is given either expressly or by implication. It certainly is not given ^{expressly.} The intended way is no part of that which was granted; and the declaration of an intention is not an implied grant. Again, the under-lease describes the ground demised, and the ways granted by the words "all ways thereunto appertaining." The road in question being over the soil of the original lessor, would not pass by those words. Leases generally contain the words "heretofore used," by which such a way would pass. But in the absence of them, or any other words to the like effect, the under-lease would confer nothing more than a convenient way. The rule for a new trial must therefore be made absolute.

BEST, J., concurred.

Rule absolute.

BISHOP v. HOWARD.

Where A. who held premises under a lease which expired at Midsummer, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till Christmas, and paid rent at Michaelmas and Christmas: *Held*, that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover a quarter's rent due at Lady-day.

ASSUMPSIT for use and occupation. Plea, general issue. At the trial before ABBOTT, C. J., at the London sittings after last Michaelmas term, it appeared that the defendant had, under a lease which expired at Midsummer, 1821, been in possession of a house belonging to the plaintiff. A short time before Midsummer the plaintiff applied to the defendant to give up the possession, who refused to do so without notice, and continued in possession until Christmas, when he tendered the keys to the plaintiff, who refused to accept them. No positive evidence was given of the payment of any ^{rent} at Michaelmas; but it was proved that the defendant paid a quarter's rent in March, [*101]

1822, and took a receipt for it, as for a quarter's rent due to the plaintiff at Christmas. This action was brought to recover a quarter's rent alleged to be due at Lady-day, 1822. The lord chief justice left it to the jury to say, whether a new agreement for a tenancy could reasonably be inferred from that which had passed before Midsummer, 1821, and from the payments above mentioned, or whether it was merely a holding over by the defendant. The jury found a verdict for the defendant; and in Hilary term a rule having been obtained for a new trial,

Scarlett and R. Scarlett now showed cause. After the expiration of the old lease the defendant was merely a tenant at will, and there could be no yearly or quarterly tenancy unless there were a fresh contract. But that was negatived by the jury. *Right dem. Flower v. Darby*, 1 T. R. 159, proceeded on the ground of such supposed contract. Here, no such contract existed before Midsummer, 1821, and therefore no continuation of it could be presumed. No notice to quit was necessary at Midsummer, for the term ended on a precise day. *Messenger v. Armstrong*, 1 T. R. 53. And the defendant had a right to quit at Christmas when he tendered the keys of the house, the jury having found that no fresh contract was made. It appears as if there had been a mistake between the parties, and that they supposed the old tenancy to end at Michaelmas. That explains the defendant's refusal to give up the possession at Midsummer, *102] and does away with the idea that any new tenancy was *contemplated by the parties. In *Zouch dem. Ward v. Willingale*, 1 H. Bl. 311, where the landlord had distrained after notice to quit, that was certainly held a waiver of the notice; but there the defendant had before been tenant from year to year. Here there was no such previous tenancy; and the jury negatived the existence of a new agreement.

F. Pollock, contra. The evidence established a tenancy from year to year, or at least from quarter to quarter, as a presumption of law, and it was not a fit question for the consideration of the jury. Before Midsummer, the plaintiff asked if the defendant would give up the possession, and the defendant refused to do so, and claimed a notice to quit. He must then have considered himself a tenant, and what was formerly a tenancy at will is now held to be a tenancy from year to year. *Doe dem. Flower v. Darby*; *Doe v. Watts*, 7 T. R. 83; *Doe v. Weller*, 7 T. R. 478. It is not necessary that rent should have been paid for a whole year; payment for one quarter at Christmas was sufficient. Had the landlord brought ejectment against the defendant without notice, the production of the receipt for rent would have been an answer to the action.

ABBOTT, C. J. It occurred to me at the trial, that the refusal to quit at Midsummer, and the payment of rent at Michaelmas and Christmas, were facts on which a new contract of renting the premises might or might not be presumed; and I considered it as a question for the jury, and not as a question of law. I *103] therefore left it to them to say, whether a tenancy was created, or whether there was a mere holding over by the defendant; and they found for him. If those acts were conclusive evidence of a new tenancy from year to year, my direction was wrong, and there ought to be a new trial. My learned brothers think that the commencement of another year and the payment of rent concluded the question in favour of the plaintiff. I have still some slight doubts upon the question, but defer to their authority.

BAYLEY, J. It appears that, before Midsummer, in a conversation between the plaintiff and defendant, the latter insisted upon his right to have a notice to quit; that he was holding himself out as tenant of the premises. He continued in possession until Christmas, and in March following, paid rent for the quarter ending at Christmas; that was evidence that a quarter's rent had been paid at Michaelmas. If he paid that money as rent, it took away his power to say that he was not tenant, as the receipt of it took away that power from the landlord. In the case put of an ejectment brought to recover possession, the production

of the receipt or proof of the payment of rent at Michaelmas would have been a bar to the action; and the situation of the plaintiff would be singularly hard if he could not maintain either use and occupation, or ejectment. I think, therefore, that there should be a new trial.

HOLROYD and BEST, Js., concurred.

Rule absolute.

*The KING v. THOMAS DOLBY.

[*104

The panel of tales having been quashed in a special jury case, on the ground of *unindifference* in the sheriff: *Held*, that a *venire facias* was properly awarded to the coroner, although two of the special jurymen appeared and were sworn on a former occasion.

Upon an award of tales at *Nisi Prius*, it is not necessary that the tales should be selected out of persons accidentally present; they may be selected out of persons whose presence the sheriff or coroner has taken previous means to obtain.

INDICTMENT for libel. The case came on for trial before ABBOTT, C. J., and a special jury, at the Middlesex sittings after Michaelmas term, 1821. Two of the special jurymen only having appeared, the prosecutor prayed a tales; the defendant challenged the array of tales, on the ground that John Garratt, Esq., one of the two persons who together constituted the sheriff of Middlesex, was, at the time of arraying the panel of tales, one of the prosecutors of the said indictment. Upon which challenge the prosecutor took issue, and triers were immediately appointed, who found for the defendant on the challenge. The panel of the tales was thereupon quashed, and the cause made a remanet to the sittings after Hilary term, 1822. In the course of that term a rule was obtained for entering a suggestion on the roll, that John Garratt, who, together with W. Venables, made one sheriff, &c., was one of the prosecutors of the said indictment; and further ordering, that the jury process should be directed to the coroners of the county of Middlesex. In pursuance of the said rule, a *venire* and *distringas* issued to the coroners to summon the special jury; which being accordingly effected, the cause again came on for trial on the 26th February last. In order to be prepared with a panel *de circumstantibus*, a considerable number of persons were summoned by the coroner. The cause having been called on, and only two special jurymen attending, a tales was prayed by the prosecutor. It was *objected by the defendant's counsel, that there ought to have been a writ of *decem* or *octo* tales; but this objection was over-ruled, and the lord chief justice called on the coroners, to summon instantan- [*105
such of the bystanders as in their discretion they should think fit. Mr. Sterling, the only coroner present, was proceeding to obey this order; it was objected by the defendant's counsel, that the *venire* was awarded to the coroners in the plural, and that the return must be made by both. The lord chief justice allowed the objection, and the case was made a remanet. The indictment again came on for trial at the adjourned sittings after Trinity term, 1822, and the special jurymen having been called over, and six having appeared, amongst whom were the two who appeared on the first occasion, the officer was proceeding to swear talesmen, when the coroners' return was objected to, on the ground, that as two special jurors had appeared when the case was first down for trial, the coroners ought to have then summoned a sufficient number to make up the deficiency, instead of summoning a full jury. This objection was overruled. It was then objected that the coroners, in violation of the statute which directed that the tales should be chosen *de circumstantibus*, had, by letter, requested persons to attend as jurors. The tales were taken from the common jury panel, from which talesmen were usually summoned. The lord chief justice overruled the objection, and the defendant was tried, and found guilty. A rule *nisi* for a new trial was obtained, in Michaelmas term, upon three grounds: first, because the coroners had summoned the talesmen, instead of taking those who were accidentally present; secondly, that there was a mistrial, it appearing

*106] *that the special jury had been summoned by the coroner, to which when summoned by the sheriff, there was no challenge, and two of the special jurymen had appeared when the case was first called on for trial; thirdly, that there were two venires on the record.

Gurney and Tindal, on a former day in this term, showed cause. It would be extremely harsh to presume that the coroners would be guilty of an offence, when there does not appear the slightest ground for suspecting one. But, unless it be shown that they acted corruptly in summoning certain persons to serve as talesmen, the objection to those who were summoned, cannot prevail. The offence of embracery most nearly resembles that which is now imputed. But a coroner cannot be guilty of that unless he acts corruptly. *Bacon's Abr. tit Juries, Judgment in Attaint*(3.) It is not enough to show that the coroner, a known officer of the court, has brought certain persons into court to provide for a deficiency of special jurymen. Some improper motive must be shown, which cannot be done in this instance, as what he did was in obedience to a rule of court. As to the objection, that there is a second venire upon the record, although two jurymen appeared on the first. Indeed, the course pursued was the only practicable one since the statute 3 G. 2, c. 25. At common law there were neither tales de circumstantibus nor special juries. Then there was a venire, habeas corpora and distringas; if a tales were awarded, the habeas corpora or distringas issued again, with a command to add octo or decem, &c., tales to those summoned on the venire. By 35 H. 8, c. 6, s. 5, the tales de circumstantibus in civil suits was given, and that was extended by the

*107] *4 & 5 Ph. & M. c. 7, to prosecutions tried at nisi prius. By the 7 & 8 W. 3, c. 32, s. 3, an act for the ease of jurors, the sheriff is directed to return as talesmen, those who shall be returned upon some other panel to serve at the same assizes. And by the 3 G. 2, c. 25, the same panel is to be annexed to every venire facias; and the 15th section of that act says, that when a special jury has been struck, that shall be the jury to try the cause. *Rex v. Perry*, 5 T. R. 453. The mode of proceeding adopted in this case, was the only one by which those statutes could be obeyed. The list of special jurymen was handed to the coroners; they summoned them all, and returned the common venire panel for the talesmen. Had a writ of decem tales issued, that would have been in violation of the 3 G. 2, c. 25, s. 15. Had any other talesmen been taken, the 7 and 8 W. 3, c. 32, would not have been observed. The 42 Ed. 3, c. 11, manifestly does not apply to the tales, but only to the original panel returned upon the venire. *Symonds v. Walsh*, Cro. Jac. 547, by no means proves that there cannot be two venires. There the judgment was reversed, because the venire was awarded to the wrong person; and in *Pretious v. Robinson*, 2 Ventr. 173, it appears that the jury were selected from different panels returned to the two venires, and no ground was assigned for issuing the second venire. And on the other hand, *Rex v. The City of Worcester*, Skin. 105, and *Sir Percival Willoughby v. Egerton*, Cro. Jac. 35, show that there may be a second venire where the sheriff is unindifferent. Now here there is a suggestion on the record, that the sheriff was not the *proper officer

*108] to return the jury; that has not been denied, and, therefore, the venire was properly awarded to the coroners.

Scarlett and Evans, contra. The coroner ought not to have used means to procure the attendance of particular individuals as talesmen. If the coroner might so collect persons, the sheriff, in all criminal cases, might act in the same manner; for the 7 & 8 W. 3, c. 32, requiring the sheriff to return such persons to serve upon the tales as shall be returned upon some other panel, does not apply to criminal cases. He might collect persons whom he, from bad motives, procured to attend. Nay, it is possible that some of the very twelve persons to whom the defendant had objected, as special jurymen, might, by such means, be called upon to serve as talesmen. A verdict of acquittal or of

guilty might in all criminal cases be made certain, if the officer returning the jury was so disposed. By the common law no persons could be summoned on the tales without affording to the party accused the opportunity of knowing beforehand who those persons were to be. By the 42 Edw. 3, c. 11, it is ordained, that no inquest except assizes and deliverance of jails be taken by writ of nisi prius, nor in other manner, at the suit of any, great or small, before that the names of all them that shall pass in the inquest be returned into the court. This statute applies to all cases, criminal as well as civil, 2 Hawk. b. 2, c. 41, s. 21. This statute would be virtually repealed, if the officer returning the jury had the power contended for. The word "circumstances" expressly meant persons accidentally present. If the sheriff had such a power, the legislature would have given him some process to compel the attendance of the persons he so selected; but there is no such process. As to the [*109 other point, if *The King v. Edmonds*, 4 B. & A. 471, be law, the special jury panel could not be challenged, because the sheriff was not unindifferent. The special jury in this case was not challenged, and the sheriff, therefore, ought to have summoned it; and if the jury was not full, the coroner might have been present and summoned a tales. The suggestion does not affect the question, because, unless it stated a legal ground for directing the process to the coroner, it would not make the proceedings legal. *Symonds v. Walsh*, Cro. Jac. 547. If *The King v. Edmonds* be not law, then the defendant is entitled to a new trial, because his counsel was prevented challenging the array of the special jury. *Præitibus v. Robinson*, 2 Vent. 173, is an authority to show that there cannot be two venires on the record. *Cur. adv. vult.*

ABBOTT, C. J., now delivered the judgment of the Court.

This case came before us on a motion for a new trial. Two objections were taken to the proceedings; first, that the award of a venire facias juratores to the coroners, after a prior award of a similar process to the sheriffs, on which something had been done, was irregular; and, secondly, that upon the prayer and award of a tales at Nisi Prius, under which the cause was actually tried, the tales ought to have been taken out of the persons who should happen to be accidentally present in court, without any previous measure adopted by [*110 the coroners to obtain the presence of any persons whom they might consider to be proper persons to constitute the tales, if a tales should become necessary.

The first objection was argued very much upon a supposition that the process to the coroners directed them to summon other persons than those who had been previously summoned by the sheriffs. But this supposition is not warranted by the language of the record, for the direction to the coroners is only to cause to come twelve good and lawful men, not twelve other good and lawful men; and in fact, this being a special jury cause, though it does not so appear on the record, the primary panel returned by the coroners contained, as it ought to have done, the same identical names, and no others, as the panel previously returned by the sheriffs on the process directed to them; being the persons nominated under the rule of court, and in conformity to the act of parliament. And the effect and substance of the whole proceeding was precisely the same as if an octo or decem tales had been awarded, according to the ancient course of proceeding, prior to the statutes giving the tales according to the practice now in use. So that the case has been tried by the very *principal jurors*, by whom, according to the defendant's argument, it ought to have been tried. We therefore think there is not any sufficient foundation for this objection, either upon or out of the record.

As to the second objection, viz., that the coroners ought to have taken the tales from such persons as might happen to be present in the court, and ought not to have summoned any persons of whom they might make a panel, we are of opinion that this objection also ought not to prevail.

*No objection was made at the trial to the individuals summoned and appearing: nor was it alleged that the coroners had, in the particular instance, acted from any improper motive or design. But the objection was put upon general principles; upon the supposed danger of allowing a coroner, or sheriff, to secure the attendance of persons chosen by himself, and thereby in effect to select a part of the jury. This objection is in direct and manifest contradiction to the whole principle and practice of the common law. By the common law, the person to whom the jury process was directed, whether sheriff or coroner, as the case might be, chose whom he would summon to attend, and place upon his panel: if a full jury did not appear, and a decem or octo tales was awarded at the common law, the sheriff or coroner in like manner selected the persons in execution of this process. Our common law acknowledges no such absurdity as taking, by chance and hazard, the persons who are to discharge the important duties of jurymen. It has ordained that this shall be done by some known and responsible officer, who may be punished if he act amiss. Even under the statute 35 Hen. 8, c. 6, which gave the tales de circumstantibus, as it is usually called, a discretion is to be exercised by the officer. The provision was made, as appears by the words of the fifth section, "for the more speedy trial of issues," not for the prevention of partiality, as was suggested at the bar. And by the sixth section, the sheriff or other minister, is "to name and appoint so many of such other able persons of the county as may be present at the said assizes, or nisi prius," as shall be sufficient to make up the number required. Nomination and appointment import selection. *A discretion is to be exercised, though the number of the persons out of whom the choice is to be made is of necessity limited to those who may happen to be at the assizes, or nisi prius. And it was well observed, on the part of the crown, that such a proceeding as was adopted by the coroners on this occasion, is much less open to the probability of an unfair trial, than the taking the tales from those who may happen to be present in court; inasmuch as either party may on a trial take measures to fill the court with his own friends and partisans. For these reasons we think the rule for a new trial ought to be discharged.

Rule discharged.

The KING v. ALTHORNE. (a)

The pauper was hired to serve as a servant in husbandry from Michaelmas, 1821, to Michaelmas, 1822, at weekly wages; and if he and his master could not agree for the harvest, he was to harvest for himself. Previously to the harvest, the master offered the pauper 5*l.* for the harvest, which he accepted, and continued in the service the whole year: *Held*, that this was an exceptive, and not a conditional hiring, and that no settlement was gained.

On an appeal against an order of two justices, for the removal of John Wiggins and Elizabeth his wife, from the parish of Mayland to the parish of Althorne, both in the county of Essex, the sessions confirmed the order, subject to the opinion of this court, upon the following case. "The pauper, who *113] was settled in Althorne, at Michaelmas, 1821, agreed with Mr. Croil, a farmer in the parish of Mayland, to live with him as his servant in husbandry from that Michaelmas till the Michaelmas following, at 10*s.* per week for the winter half year, and 1*l.* per week for the summer; and if he and his master could not agree for the harvest month, the pauper was to harvest for himself where he pleased." Previous to the harvest the master offered the pauper 5*l.* for the harvest, which he agreed to take; and accordingly continued in his master's service during the whole year."

Jessopp, in support of the order of sessions, was stopped by the Court.

(a) In pursuance of the king's warrant, issued ten days before the end of Trinity term, Bayley, Holroyd, and Best, J., sat on the 23d of June, and the following days, until the 5th of July inclusive, in the room adjoining the court; and this and the several following cases were argued and determined.

Brodrick, contra, contended, that this was a conditional and not an exceptive hiring, and that, as the pauper actually served for the whole year, he gained a settlement in Mayland.

But *per Curiam*. The service would not have continued for the whole year, unless after the original hiring a new bargain had been made for the harvest month. There was not then any one hiring for a year: and therefore, although the pauper actually served for a year, it was not such a service as confers a settlement.

Order confirmed.

*The KING v. The Inhabitants of BYKER. [114

A pauper was by indenture hired for a year as a driver in a colliery, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day more when that time was exceeded; and he was to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. per day for lying idle (to be deducted out of his wages.) There was a proviso, that nothing in the indenture should be construed to oust the jurisdiction of the justices, or to prevent either master or servant from applying to them in case of disputes; and a covenant, that in case the master about Christmas should wish to repair any engine, &c., belonging to the colliery, he might stop the workings for any period not exceeding seven days, without paying any wages to the pauper, unless employed in other work: *Held*, that this was a conditional, and not an exceptive contract, and that the pauper gained a settlement by serving under it for the whole year.

UPON an appeal against an order of two justices for the county of Durham, for the removal of William Gray and Mary his wife, from the township of Haughton-le-Spring, in the said county of Durham, to the township of Byker, in the county of Northumberland, the Court of Quarter Sessions at Durham confirmed the order, subject to the opinion of this Court, upon the following case. By an indenture, bearing date the 23d day of October, 1809, and purporting to be made between James Potts of Byker, in Northumberland, of the one part, and the several persons whose names or marks were thereunto subscribed, of the other part, the said James Potts did hire and retain the several other parties thereto, and they did hire and bind themselves as workmen or servants, to be employed in a certain colliery for the term of a whole year, from the 21st day of January, 1810, and to serve J. P. in the colliery for certain hire or wages in the indenture mentioned; and J. P. did covenant to pay to every driver, for every good and sufficient day's work, not exceeding fourteen hours, in single-shaft pits (and 2d. per day when that time was exceeded) 1s. 10d. And the several persons hired and retained by the indenture did covenant with J. P. that each of them would, in their several stations, diligently perform and obey his orders and directions as *to the manner of work- [*115 ing the colliery, and work the colliery fairly and regularly, and as therein further expressed; or in default thereof, should forfeit and lose (to be retained out of their wages) the sum of 10s. 6d. for every act of disobedience; and also the sum of 2s. 6d. per day for lying idle upon each hewer, deputy-crane-man, on-setter, sinker, driver, or off-handman, to be deducted as aforesaid; and for every working day which they or any of them so hired and bound as aforesaid should absent themselves from their employment, or should neglect or refuse to fulfil and execute the whole of the business of a usual day's work, unless prevented by sickness or some other unavoidable cause, the defaulters should forfeit and lose (to be retained as aforesaid) the sum of 2s. 6d. for every such default, refusal or neglect; all which said forfeitures and penalties should be deducted and retained out of the wages or earnings of each offender at the first pay-day next after the offence should be committed. And in the said indenture was contained a proviso, that the indenture should not, nor should any covenant or clause therein contained, be construed to extend to oust or exclude any justices of the peace from any jurisdiction or cognisance which the statute law of this kingdom hath given to such justices over masters and servants; but,

on the contrary, that each of the said several parties thereto should be at full liberty, notwithstanding any thing therein contained, upon any breach of any of the before-mentioned covenants, to call for and require the aid and assistance of any justice or justices, to compel the performance, or punish any breach of such covenants, as far as by law they could or might if the said indenture had not been made. And it was further covenanted and agreed, that in *116] case the said J. P. should think it necessary, at or about Christmas, 1822, to repair, alter, or amend any engines or machines of or belonging to the said colliery, or to remove or prevent any obstructions or hinderance which might have happened to the same, or to do any other thing which he the said J. P., his executors, &c., should think needful to be done in the said colliery, or the working of the same, that then it should be lawful for him to stop the workings at all or any of the pits of the colliery for any length of time not exceeding in the whole the space of seven days, without paying or allowing any wages or sums of money to any of the several parties who should thereby be prevented from doing their daily work, save and except such of them as should be employed by him in any other work in and about the colliery, or otherwise, who should be paid or allowed reasonable wages for such his or their other work. This indenture was executed by James Potts and by William Gray, the pauper, together with a great number of other workmen, upon the day it bears date. William Gray was retained and hired by the said indenture as a driver. He was at that time under age, unmarried, and without any child. At the time when the indenture was executed William Gray was in the service of J. Potts, at the colliery, and he continued in his service as a driver for a whole year, from the 21st of January, 1810, till the 21st January, 1811, and resided during all that year in the township of Byker. There was no evidence, either that the pauper, William Gray, had or had not incurred any penalty or forfeiture during his year's service under the indenture, or that any deduction had or had not been made from his wages.

*117] *E. Alderson*, in support of the order of sessions. The pauper acquired a settlement in Byker. The question here, is very different from *Rex v. Gateshead*. (a) In that case there were several clear exceptions out of the contract. Here, there is nothing of that kind. The service is not limited to any stated number of hours in each day. The question must be decided by this principle, that the exception must be in the contract itself. It will not be an exception if by the custom of the country, or by the custom of a particular trade, or by special leave of the master, the servant works during certain hours only. (b) The clerk in a mercantile house attends during certain hours only; but if he were hired for a year, the hours of rest would not be an excep

(a) *Rex v. Gateshead*, E. T. 2 G. 4.—The pauper was, together with many other persons, hired to work in a colliery from the 5th of April, 1813, to the 5th of April, 1814. Amongst other things, it was stipulated that each man should on each working day do such a quantity of work as should be deemed equal to a full day's work, and should not leave the pit until that quantity was completed, or in default thereof should forfeit 2s. 6d. The master stipulated to find work for the men during the whole year, and to forfeit 2s. 6d. for every day that he should oblige them to lie idle, except at the Christmas holidays, which were not to exceed ten days. There was also a proviso, that nothing in the agreement should oust the jurisdiction of the magistrates. The pauper worked for the whole year, including the holidays, except on certain Saturdays called pay Saturdays, when the wages were paid, and the men did no work. The justices at sessions held that this hiring and service did not confer a settlement.

Williams, in support of the order of sessions, relied upon *Rex v. Edgmond*, 3 B. & A. 107, and contended that the agreement between the pauper and his master was merely for a certain quantity of work.

Tindal, contra, referred to the proviso at the end of the agreement to show that the relation of master and servant existed throughout the year.

Per Curiam. That would not authorize the magistrates to interfere contrary to the express contract of the parties. The case is not distinguishable in principle from *Rex v. North Nibley*, and *Rex v. Edgmond*. The pauper has not stipulated to be under the control of the master for the whole year.

Order of sessions confirmed.

(b) See *Rex v. St. Agnes*, Burr. S. C. 671; *Rex v. Birmingham*, 1 Doug. 333.

tion *out of the contract. There are certain implied exceptions in every contract. *Rex v. All Saints, Worcester*, 1 B. & A. 322. Here, the [*118 number of hours during which the service was to be performed, was merely introduced as a mode of calculating the amount of the wages. The hiring was general, although the mode of calculating the wages was special; and wages were not to be paid for fourteen hours' service only; if the service were longer, the pauper was to have higher wages. So, also, the retention of part of the wages in case of negligence, was merely for the purpose of enforcing obedience. And besides the forfeiture for absence, there is a special provision, that the jurisdiction of the magistrates shall not be ousted; and they might compel the party to serve. That does not restrain the original unqualified hiring for a whole year. The stipulation as to repairing the engine applies to the master alone, and does not give the servant any power to go away. The master might employ him elsewhere. That, therefore, was not an exceptive hiring, and the service under it was sufficient to confer a settlement. *Rex v. Edmond*, 3 B. & A. 107, is distinguishable; for in that case there was a clear stipulation for absence, and leave to serve any other master during severe frost. That, too, was considered as a contract for a certain quantity of work per day. Here, the pauper was compellable to serve for the whole day. There was no liberty for the pauper to go into another service during the repair of the engine; and if the work at the pit was discontinued for more than a week, the master was to pay wages.

Tindal, contra. This was an exceptive contract. The agreement was, that the pauper should receive a *certain sum for a day's work not exceeding [*119 fourteen hours. No magistrate could have compelled the pauper to return to work after the expiration of the fourteen hours. Then, according to *Rex v. North Nibley*, 5 T. R. 21, that did not confer a settlement. It is no answer to say that the hiring was originally for a year or years; for that was the case in *Rex v. Edmond*. In that case ABBOTT, C. J., says, "I do not see what remedy the master could have had, supposing the pauper to have refused to work after the usual hours." The stipulation in that case for absence during frost, resembles the provision here for the repair of the engine. In this case, it must be admitted, the pauper has not any express liberty to work elsewhere; but if the master chose to turn his men off for a time, they would not be bound to remain idle, but might enter into another service; the cases, therefore, are not to be distinguished. *Rex v. Gateshead* is also in point for the appellants. In that case there were certain forfeitures for absence, and at the end of the agreement a proviso, that nothing therein contained should have relation to the jurisdiction of magistrates in cases of disputes between master and servant. And it was observed by the Court: "The last clause cannot control the express stipulations previously agreed to. That of the servant's leaving his work is contemplated by the parties themselves, who agree, that for any default he shall pay certain fines and penalties. This case is not to be distinguished from *Rex v. Edmond*." Neither is the present case distinguishable; and if those cases were well decided, the order of sessions must be quashed. *Cur. adv. vult.*

*The judgment of the Court was, on a subsequent day during the [*120 sittings, delivered by

BAYLEY, J. The question in this case was, whether the hiring were conditional or exceptive. Many cases of this description are to be found in the books, between which the distinction is rather subtle, and at first sight not easily discovered. Adverting to them all, the proper distinction appears to be this; if the bargain be originally made for an entire year, and terms are introduced applicable to a continuance of the relation of master and servant during the whole year, but there is also a provision, that in a given event it shall be competent to the parties to put an end to, or suspend the service for a part of the year, still a settlement is gained if the service is actually performed for a whole

year, and neither party avails himself of the condition. A conditional hiring is, for this purpose, the same as an absolute hiring, unless the condition is acted upon. An exceptive hiring is one by which the relation of master and servant will not subsist for the whole year, unless some further arrangement is entered into; and if by the bargain days or hours are excluded from the service, that is an exceptive hiring. It has been contended that here both days and hours are excluded, but we are of a different opinion. The pauper was hired by indenture, and it was agreed that the master should pay for every good day's work not exceeding fourteen hours, (and 2*d.* per day when that time was exceeded,) 1*s.* 10*d.* It was said that the pauper was entitled to absent himself at the expiration of fourteen hours, and that the master could not compel him to work any longer. We are of opinion, that the time was only mentioned as
 *121] the measure of the wages; that the contract does not impose "any limit upon what might reasonably be required by the master; and that the relation of master and servant continued during the whole twenty-four hours. Upon the forfeitures also, we think that the pauper might not, upon payment of them, be absent if he thought fit, but that they were inserted to enforce regular attendance; and this view of it is confirmed by the clause stipulating that nothing in the contract shall be construed to abridge the power of the magistrates. Another clause has been insisted upon for the appellants; that relating to the repair of the engine. If that was an exception, this was a contract for a year, minus seven days. But we think it a contract for a year, with power to the master to stop the work if he thought fit. Had he done so, the question would have been different; but that is not found. This, therefore, was a bargain for a year with liberty to suspend the service, which constitutes a conditional and not an exceptive hiring. This distinction between conditions and exceptions is inconsistent with all the decisions. In the cases where a servant having liberty to be absent, has been held not entitled to a settlement, it will be found, either that the servant availed himself of the liberty, or that the time was necessarily excepted out of the original contract. This being a conditional hiring, and the condition not having been acted upon, the pauper gained a settlement in Byker. And the order of sessions was therefore right.

Order confirmed.(a)

(a) In *Rex v. Bishops-Hatfield*, 2 Bott. 211, the pauper was hired for a year, with liberty to let himself for the harvest month to any other person. In *Rex v. Empingham*, 2 Bott. 217, the hiring was for a year, with liberty to be absent eleven days during the sheep-shearing season. In *Rex v. Arlington*, 1 M. & S. 622, the hiring was for a year, with liberty to be absent during
 *122] the sheep-shearing season. In *Rex v. Turvey*, 2 B. & A. 520, "the hiring was for a year from Michaelmas, to go away a month at harvest, and make up the time after Michaelmas. In each of these cases the pauper did absent himself according to the liberty reserved in the original contract; and it was held that no settlement was gained by such hiring and service. There are two cases, *Rex v. Westerleigh*, Burr. S. C. 753, and *Rex v. Winchcomb*, 1 Doug. 391, which appear to be at variance with those decisions. In each of these two cases the pauper was hired for a year, with liberty to be absent on duty as a militia man for a month, and he accordingly was absent; yet it was held that the hiring and service conferred a settlement. In *Rex v. Over*, 1 East. 599, Lord Kenyon says, that the ground of those decisions was, that the leave of absence stipulated for was no other than what the law would have compelled without stipulation. In several other cases, it has been held that implied exceptions will not prevent the gaining of a settlement, but that if they are expressed in the contract, they will have that effect. *Rex v. Macleasfield*, Burr. S. C. 458; *Rex v. All Saints, Worcester*, 1 B. & A. 322. And there appears to be this distinction between them, that notwithstanding the implied exceptions, the relation of master and servant continues during the whole year; whereas that relation has been considered at an end during the excepted periods stipulated for in the contract. *Rex v. Wrington*, Burr. S. C. 280. But in the case of the militia men, it seems that the relation of master and servant must at all events have been suspended for the time during which they were out on duty. It seems difficult, therefore, to understand on what principle those cases are sustainable; and see the observations made by the court in *Rex v. Beaulieu*, 3 M. & S. 229.

The KING v. The Inhabitants of ST. PANCRAS in the County of MIDDLESEX.

A settlement may be gained by being rated and paying parochial taxes in respect of a tenement, being above the annual value of 10*l*.

UPON an appeal against an order of two justices, whereby Kitty Buchan, the wife of William Buchan, was removed from the parish of Lambeth, in the county of Surrey, to the parish of St. Pancras, in the county of Middlesex, as the place of the legal settlement of the said Kitty Buchan. The sessions confirmed the order, subject to the opinion of this Court on the following case: The husband of the said Kitty Buchan occupied a *house in Thorn- [*123 haugh street, in the parish of St. Pancras, and resided in the same for a period not exceeding nine months, and subsequent to the 2d day of July, 1819, at the yearly rent and value of 80*l*.; and during such occupation her said husband was regularly rated by, and paid a poor-rate to, the parish of St. Pancras, as such occupier of the said house.

Cowley, in support of the order of sessions. The 3 & 4 W. & M., c. 11, s. 6 enacts, "that any person coming to inhabit in any parish charged with and paying his share towards the public taxes of the said parish, shall gain a settlement." The paying of taxes was considered by the legislature as equivalent to the notice required by s. 3 in other cases. There can be no doubt, therefore, that, under this section a settlement might be gained by paying rates and taxes for a tenement of any value. The 35 G. 3, c. 101, s. 4 enacts, "that no person shall gain a settlement by being charged with and paying his share towards the public taxes or levies of the said parish, for, or on account, or in respect of any tenement, not being of the yearly value of 10*l*." That section, therefore, in terms, only repeals the sixth section of the statute of William, so far as regards the paying of rates and taxes in respect of tenements under the value of 10*l*., and may be considered as having the same operation as if it was introduced as an exception into the sixth section of that statute. It is perfectly clear, therefore, that a settlement may be gained by the payment of rates, in respect of tenements above the value of 10*l*. It is true, that in *Rex v. The Inhabitants of Islington*, 1 East, 283, *Lord KENYON is reported to have said, that it was intended, by the 35 G. 3, to make an end of this head of settle- [*124 ment law in future; but that was an extra-judicial opinion; and in *Rex v. Penryn*, 5 M. & S. 443, Lord ELLENBOROUGH delivers a similar opinion; but Mr. Justice ABBOTT seems to have considered the operation of the statute to be confined to cases where the rates were paid for tenements of very small value. That decision, however, cannot be supported. There is one case where a person residing on a tenement of more than 10*l*. annual value could not gain a settlement, except by the payment of rates; and that is the case of a servant to the crown, residing in a tenement belonging to the public.(a) There he would not gain a settlement by renting a tenement, nor by being an owner; for it was not his own. The 59 G. 3, c. 50 does not affect the question at all, for that is expressly confined to settlements by the renting of tenements.

Barnewall, contrâ. Before the 35 G. 3, c. 101 passed, the settlement by payment of taxes was never resorted to, unless the pauper rented a tenement of less than 10*l*. a year value. When, therefore, it was enacted, that no settlement should be gained by paying taxes for such a tenement, it is manifest that the legislature intended to take away that head of settlement altogether; for it in terms destroyed that which was in practice the only settlement, by payment of rates. That was the opinion of Lord KENYON, in *Rex v. Islington*, 1 East, 283, to which Mr. East, the reputed author of the act, has added a note, without expressing any disapprobation of that opinion. *The decision of [*125 court in *Rex v. Penryn* is an authority expressly in point. And Lord

(a) See *Rex v. Cheshunt*, 1 B. & A. 473.

ELLENBOROUGH delivered a very strong opinion upon the very question now before the court. The 59 G. 3, c. 50 is also in favour of this construction; for although it appears by its preamble to be confined to settlements gained by the renting of tenements, yet it enacts, that "no person shall acquire a settlement by or by reason of dwelling for forty days in any tenement, unless it be held for the term of one whole year, and the rent paid for a year," &c. &c. But if a settlement may be gained in every one of those cases, by paying the smallest sum for rates, although the tenement be not held for a year, and although no rent whatever be paid, a party may be said to obtain a settlement by reason of dwelling in a tenement; and that statute will be virtually repealed.

Cur. adv. vult.

BAYLEY, J. The question in this case is, whether the right to a settlement, by being rated, and paying taxes, was still a subsisting right at the time when the pauper was rated and paid, the tenement which he occupied being of the annual value of 10*l.* or upwards. In this case the pauper could not gain a settlement by renting it, because he had not been in the occupation of it for the period of one whole year, as required by the 59 G. 3, c. 50. In order to decide the question, we must advert to the 35 G. 3, c. 101, s. 4, which enacts, that "no person or persons whatsoever, who shall come into any parish, township, or place, shall gain a settlement in such parish, township, or place, by being charged with and paying his, her, or their share towards *the public
*126] taxes of the said parish, &c., for, and on account, or in respect of any tenement or tenements, not being of the yearly value of 10*l.*;" and it has been contended, that this head of settlement was entirely put an end to by that clause. It is material to consider what was the law upon this subject before the 35 G. 3, c. 101, passed. A person rated and paying taxes for a tenement, whatever might be its value, acquired a settlement. The parish in such case was considered as having adopted him as one of their parishioners. In most instances, where the tenement was of the yearly value of 10*l.*, the occupier would obtain a settlement upon other grounds. In the course of the argument, however, one instance was referred to, in which a party occupying such a tenement would not acquire a settlement, unless on the ground of paying rates. I allude to the case of a person living in a house belonging to the king, as a servant of the public. The words of the clause to which I have referred do not, in terms, import an intention of the legislature to abolish this head of settlement entirely. They are qualified, and apply expressly to tenements not being of the yearly value of 10*l.* And before we give a general effect to words which are not in themselves general, we ought to see clearly that such was the intention of the legislature. I think that it would be going too far to give a general effect to the words of this act, when we find that being rated and paying, as applied to a tenement of above the annual value of 10*l.*, was one medium by which a settlement in all cases might be obtained, and in some instances the only medium. The cases of *Rex v. Islington*, and *Rex v. Penryn*, have been referred to in
*127] argument, "and are certainly at variance with the opinion of the Court. In the former, however, the point did not arise, and the opinion of Lord KENYON was quite extra-judicial. The real question was, whether the operation of the 35 G. 3, c. 101, s. 4, was limited to persons who should thereafter come into any parish, or whether it extended to persons residing there before. In *Rex v. Penryn*, the question was again presented to the consideration of Lord ELLENBOROUGH, who certainly gave a distinct opinion, that it was the intention of the legislature to abolish entirely this head of settlement. The present lord chief justice merely said, "that it was expedient to do away settlements by paying rates for tenements of very small value." It does not appear by the report whether my brother HOLROYD or myself were present. These two authorities naturally drew the attention of the Court carefully to consider the words of 35 G. 3, and the state of the law as it existed before the passing

of that act. If there had been no case before that time in which the occupier of a tenement of 10*l.* annual value would gain a settlement by the payment of rates, and on that ground only, then perhaps the words of the statute might be construed to have a general operation, and to annihilate this head of settlement altogether. One instance, however, has been mentioned, and possibly there may be others, where, before the statute 35 G. 3, a settlement could not be acquired at all by the occupier of such a tenement unless by the payment of rates; and that being so, I think that we are not warranted in saying that these qualified words were intended by the legislature to have a general and unqualified operation so as to abrogate entirely this head of settlement. It might perhaps be imagined, when the 59 G. 3, c. 50, passed, *that this head of settlement no longer existed; and we have avoided delay in giving our [*128 opinion, that if such were the notion, the error may be remedied during the present session of parliament.

Order of sessions confirmed.(a)

(a) The sole object of the legislature in passing the 35 G. 3, c. 101, was to take away the power of removing poor persons likely to become chargeable, and to make them irremovable till actually chargeable. But in doing this, it became necessary to guard against certain evils which this change would produce to parishes. For instance, by the old law, a person coming into a parish, and giving a written notice to the overseers, would, if he resided forty days, gain a settlement. The reason of this being, that if likely to be chargeable, the overseers, availing themselves of the knowledge thereby communicated, might remove him. But when the law was altered, and actual substituted for probable chargeability, it would follow that a person very likely to become chargeable might, if he was desirous of doing so, come in and give notice, and, in defiance of the overseers, acquire a settlement by only not demanding relief for forty days. In order to remedy this evil, settlement by notice was abolished by sect. 3. So, again, if a person came to settle on a tenement under 10*l.*, he would, by the old law, be removable if likely to become chargeable; but if he was rated, and paid rates in respect of it for forty days, and was not during that time actually chargeable, he might become settled in the parish, and demand relief on the forty-first day. For this reason, such persons rated in respect of tenements under 10*l.*, were prevented by sect. 4 from gaining settlements by paying rates. Similar reasons may be given for the two remaining enactments in the fifth and sixth sections. The whole may be thus summed up: wherever the change of the law from probable to actual chargeability, enabled persons who were likely to become chargeable to obtain settlements by preventing the parish officers from removing them during forty days, those settlements were abolished; but where, by the law as it stood before the 35 G. 3, c. 101, such persons were irremovable, that act did not interfere with their cases. See the judgment of Holroyd, J., in *Rex v. Idle*, 4 B. & A. 156. Applying this principle to the case here decided, we may conclude that the 35 G. 3, c. 101, did not prevent settlements by paying rates in respect of tenements above 10*l.*; for to such cases the inconvenience above pointed out did not apply. By the 13 & 14 Car. 2, persons coming to settle on tenements above 10*l.*, and consequently persons paying rates in respect of such tenements, were irremovable, even though likely to become chargeable. Their situation, therefore, was not altered by the 35 G. 3, c. 101.

*The KING v. The Inhabitants of GEDDINGTON. [*129

A written agreement was made for the purchase of an estate, to be paid for by two instalments; the first was to be payable within a few days after the signing of the agreement, and the last after the expiration of seven months. The vendor was to make out a good title on the payment of the last instalment, and to convey the premises; but the purchaser was to be let into possession upon the payment of the first instalment. The purchaser paid the first instalment, and was let into possession, and continued in possession for a year and a half, but the last instalment was never paid, nor any conveyance ever executed; and the purchaser afterwards gave up the contract upon receiving back part of the first instalment: *Held*, that under this contract, the purchaser did not acquire an equitable estate, so as to gain a settlement under the 9 G. 1, c. 7, s. 5.

UPON appeal against an order of two justices, whereby John Garfield, his wife and children, were removed from the parish of Geddington, in the county of Northampton, to the parish of Dunton Bassett, in the county of Leicester; the sessions quashed the order, subject to the opinion of this Court on the following case.

In November, 1814, the pauper, John Garfield, being then resident in the parish of Geddington, entered into a written agreement with one Richard Nason, by which the latter agreed to sell to Garfield, all that messuage, &c., situ-

ate at Dunton Bassett, in the county of Leicester, therein described, at or for the price of 310*l.*, to be paid as follows; the sum of 160*l.* on the 30th day of November instant, and the sum of 150*l.* on the 24th June next, with interest for the same, after the rate of 5*l.* for 100*l.* for a year from the date of the agreement. And Nason agreed at his costs to make out a good marketable title to the premises, and to convey the same at the costs of Garfield on the 24th June next, on payment of 150*l.* with interest. And Garfield agreed with Nason, to pay to him on the said 30th November instant, the said sum of 160*l.*, and also the further sum of 150*l.* with interest on the said 24th June next, on having *130] the premises thereby agreed to be sold conveyed to him, Garfield. *And on payment of the sum of 160*l.* Garfield was to be let into the possession of the premises; but in case default should be made by him of payment of the 160*l.*, the agreement was to be void, and Nason was to be at liberty to sell the premises on the 5th December next. The sum of 160*l.* was paid on the day appointed, and full possession then given by Nason, and the pauper resided in the house in Dunton Bassett for a year and a half, and upwards, immediately subsequent; but he never paid the 150*l.* so agreed to be paid on the 24th June, nor was any conveyance ever executed. An action at law was brought by Nason for the 150*l.*; but afterwards by an agreement between the parties the same was discontinued; Nason paying the costs and returning to the pauper 30*l.* of the said 160*l.*, and the pauper agreeing to give up the contract and the possession, which was accordingly done.

Reader, Adams, and Holbeach. The pauper did not gain any settlement in Dunton Bassett by the occupation of the premises contracted for; for he had no legal or equitable estate in them: not having paid the full consideration-money, a court of equity would not have decreed a conveyance. And, although if the last instalment had been paid, the pauper might in equity be considered as seised from the time of the contract; yet having failed in making that payment, and the contract having been rescinded, it may be considered as if it never had existed, and consequently the pauper never had any equitable estate. In order to gain a settlement, the party must have an equitable estate; and if it be even doubtful what a court of equity would do under the circumstances, this *131] court will not take cognisance of the interest. *Rex v. *Standon*, 2 M. & S. 461; *Rex v. Toddington*, 1 B. & A. 560; *Rex v. Horndon-on-the-Hill*, 4 M. & S. 562, and *Rex v. Hagworthingham*, 1 B. & C. 634. It may be said that he acquired an interest in the lands from November to June, and that that is sufficient to give a settlement, but it is not found in the case that that possessory right was of the value of 30*l.*; and, therefore, no settlement could be gained under the stat. of 9 G. 1, by forty days' residence on it, *Rex v. The Inhabitants of Martley*, 5 East, 40. And it is clear that he did not gain a settlement under the 13 & 14 Car. 2, c. 12, because he did not come to settle on the property in the character of tenant. *Rex v. St. John's, Glastonbury*, 1 B. & A. 481.

Nolan, Marriott, and Amos, contra. The agreement was for a present purchase at the time when it was signed, and was not to remain in fieri until payment of the purchase-money. The equitable title is complete when the thing is agreed to be done. Here, therefore, it was complete from the moment when possession was given under the contract; although it might be defeasible on non-payment of the purchase-money. This is not a license which is personal, but an assignable interest. They cited *Wall v. Bright*, 1 Jac. & Walk. 494; *Knollys v. Shepherd*, cited 1 Jac. & Walk. 499; *Payne v. Meller*, 6 Ves. 349; *Douglas v. Whitrong*, 16 Ves. 253; *Townley v. Bedwell*, 14 Ves. 591. [HOLROYD, J. If you show that the vendor and vendee stood merely in the relation of trustee and cestui que trust, then the latter would have an equitable estate, *132] and would gain a settlement. But none of the cases cited *show that a court of equity would, under the circumstances of this case, consider

the estate to belong to the vendee as he failed to pay the residue of the purchase-money.] [BAYLEY, J. *Rex v. Long Bennington*(a) seems to be precisely in point. There the pauper agreed by parol to buy a copyhold for 150*l*. He paid 34*l*. and entered into possession, in part performance of the contract, and continued near six months; the contract was then rescinded, because the seller would not give an indulgence he had promised for the residue of the purchase-money, and the seller returned the pauper 14*l*. The question was, whether this gave a settlement? The sessions thought it did; but this Court held otherwise: for the pauper had purchased no estate or interest in this land; he could have made no claim in equity without paying the remainder of the purchase-money; and though an equitable estate is sufficient to confer a settlement, a questionable right to go into a court of equity is not.] There the agreement was by parol, and no time was fixed for the payment of the purchase-money. The payment of the purchase-money will not, in equity, take a parol agreement out of the statute of frauds, *Clinan v. Cooke*, 1 Sch. & Lef. 22; and the deliverance of possession was a part performance by the vendor, and not the vendee. In the case cited, there was no equitable estate, but at most a probability that equity would interfere on the ground of fraud. But assuming that the pauper did not acquire an equitable estate, at all events he acquired a possessory right to the premises from November till June. He was let into possession and would not be removable; for he came to settle upon his own estate. *Rex v. Fillongley*, 2 T. R. 709; *Rex v. Offchurch*, 3 T. R. 114; [*133 *Rex v. Cold Ashton*, Burr, S. C. 444; *Rex v. Edington*, 1 East, 288.

BAYLEY, J. In cases relating to the law of settlement, the manner of determining any particular point is not so important, as it is that the decisions should be uniform and consistent. For as that law is administered gratuitously by a most respectable and meritorious body of magistrates, whose habits and duties are not likely to make them acquainted with the nice distinctions of the courts of equity, it is desirable that they should have cases settled upon plain grounds for their direction, rather than that they should be called upon to entertain and decide difficult questions of equitable law. The question in this case arises on the 9 G. 1, c. 7, s. 5, by which it is enacted, "that no person shall be deemed to acquire or gain any settlement in any parish, for or by virtue of any purchase of any estate or interest in such parish whereof the consideration for such purchase doth not amount to the sum of 30*l*., bona fide paid." There must, therefore, either be an estate or interest PURCHASED; and by the latter word I understand a definite interest, for which the party contracts at the time of making the contract. If the question raised were *res integra*, I should be disposed to hold that the legislature meant a legal interest only. It has been decided, however, that a cestui que trust has a sufficient interest in land to gain a settlement under this statute, and I feel bound to adhere to those decisions; but there may be a distinction between an equitable estate and a mere equitable right, and that is adverted to by my brother HOLROYD, in the case of *Rex v. Toddington*, [*134 1 B & A. 565. The case of *Rex v. Long Bennington* is expressly in point with the present, and shows, that in cases of constructive trusts, a settlement is not gained by the cestui que trust. The agreement there, indeed, was by parol, but that circumstance formed no ingredient in the judgment of the court. The principle of the decision was, that a court of law, perhaps in ignorance of what a court of equity would do under the circumstances, held that it was not the case of a mere naked trustee and a cestui que trust; for, until the payment of the full purchase-money, the vendor had a beneficial interest, and was something more than a trustee; and therefore that no settlement was gained. There is one distinction between the two cases. In the case cited it does not appear when the residue of the purchase-money was to be paid; whereas in this case part was paid on the 30th November, and the residue was to have been paid on

(a) Trin. 57 G. 3. The learned judge read this case from a manuscript note.

the 24th June. And it is said, that during the interval the pauper was irremovable; but I think he was not irremovable till the 24th June, because it was not his own estate, either at law or in equity, until he paid or tendered the residue of the purchase-money; and that being so, I am of opinion that there was no settlement gained in Dunton Bassett, and, therefore, the order of sessions must be confirmed.

HOLROYD, J. I am of opinion that this was not to be considered the estate of the pauper, either in law or equity, so as to give him a settlement under the contract which is stated in the case. Whether if the vendee had paid or offered to pay the remainder of the purchase-money, an equitable estate would have
 *135] been gained, so as to give a settlement, is a very different question. The cases which have been cited show, that where the vendee has performed the contract in part, and has offered to pay the remainder of the purchase-money, the vendor then becomes a trustee for the vendee, and a court of equity will compel a specific performance. The case of *The King v. Long Bennington* seems to me to have been properly decided, and to govern the present. There, indeed, the contract was by parol, and it did not appear that the vendee was to have possession for a specific period of time; but these distinctions were not relied upon. Here, time is given till June, when the residue of the purchase-money is to be paid; and it is agreed that the vendee should have possession till that time. The effect of which is merely this, that it might or might not amount to a demise for that time; but there is not sufficient found in the case to show that there was a renting of a tenement of 10*l.* annual value. But it is said, that at all events there was a purchase of an interest for six months; it does not, however, appear how much was to be paid for that, or that the pauper, in purchasing that, acquired an interest in land to the value of 30*l.* If the contract was rescinded by the fault of the vendor, it is questionable whether any thing could be recovered for the possession during the six months. For these reasons I think that no settlement was gained in the parish of Dunton Bassett.

BEST, J. It has long been settled that an equitable estate will satisfy the words *any estate or interest* in the 9 G. 1; but it must be a clear and absolute equitable estate; such an estate as a court of equity would put the person claiming it into the complete
 *136] possession of, and protect him against any attempts to disturb his enjoyment of it. A court of equity could not give possession to a purchaser who had not paid the purchase-money, or keep him in possession if he were put in against the legal claim of the vendor. Such a purchaser has only an inchoate right, which is not rendered a perfect equitable estate until he has paid all that he has stipulated to pay. Where purchasers have been ready to pay the price, and tendered it to the vendor, cases have occurred in which very nice questions have arisen, whether they are entitled to a conveyance. The business in which we are occupied in this court does not qualify us for the decisions of such points. But if we are incompetent, how much more so must those be who compose the Courts of Quarter Sessions; and these things cannot be submitted to us until they have first been decided upon by them. I say, therefore, with my brother BAYLEY in the case of *The King v. Horndon-on-the-Hill*, "we cannot know how a court of equity will deal with such a case;" and that I do not see that the pauper had any equitable estate, certainly not such a perfect one as confers a settlement.

Order confirmed.

THE KING v. WEBSDELL.

Since the passing of the 50 G. 3, c. 41, the manufacturer of goods is allowed to hawk them in those places only which are mentioned in the twenty-third section of that act. The defendant was convicted in a penalty of 10*l.* for trading as a hawker, *without any license so to do*: *Held*, that the conviction was in the proper sum.

THIS was a conviction, under the 50 G. 3, c. 41, for hawking shoes without a license. The conviction set out an information, that the defendant on, &c., at Cromer, in the county of Norfolk, was a hawker and *trading person, [*137 going to other men's houses, &c.; and being such person, did, on the day aforesaid, at Cromer, carry to sell, and expose to sale, divers goods, wares, &c., to wit, a quantity of shoes, and was then and there found trading *without any license* so to do; whereupon he was summoned, &c., and the justice did convict him of the said offence, and adjudge that he had forfeited the sum of 10*l*. The sessions, upon an appeal, quashed the conviction, subject to the opinion of this Court, upon the following case. It was fully proved, on behalf of the appellant, that he was a shoemaker, and that he was the real worker or maker of the said shoes, which he "carried to sell and exposed to sale;" but as it appeared from the evidence that Cromer was not a mart, market, or fair, nor a city, borough, town corporate, or market town, the Court were of opinion that the conviction was good, although the words "or elsewhere," omitted in the 50 G. 3, c. 41, are in the 9 & 10 W. 3, c. 27. But it was objected, on behalf of the appellant, that the conviction was bad in point of form. First, because in setting forth the offence, it was not stated that the shoes were not of the manufacture of the appellant; and, secondly, because the conviction was under s. 20, of the 20 G. 3, c. 41; and that therefore the penalty adjudged (if any) should have been 40*l*., and not 10*l*. And on these grounds the conviction was quashed.

Cooper, in support of the order of sessions. The defendant was not liable to any penalty, for the sessions have found that he was the manufacturer of the articles which he offered for sale; he was, therefore, protected by the ninth section of the 9 & 10 W. 3, c. 27, by which it was enacted, "that that act should not extend to prohibit the real workers or makers of any goods or *wares [*138 within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, from carrying abroad, exposing to sale, or selling any of the said goods of their own making, in any public marts, fairs, markets, or elsewhere." That act was not altogether repealed by the 50 G. 3, c. 41, but merely as to the duties. The defendant was therefore justified in selling the articles in question at Cromer, although it is not a market town, the words "or elsewhere" in the 9 & 10 W. 3 being sufficient to authorize the sale of goods by the manufacturer in any place whatsoever. But secondly, if the defendant was liable to any penalty, it was a penalty of 40*l*., imposed by the twentieth section of the 50 G. 3, c. 41. The seventeenth section of that act which imposes a penalty of 10*l*., is plainly intended to apply to persons who have taken out a license, but trade contrary to the terms of it, or without having it upon their persons; and the twentieth section, which applies to persons trading as hawkers and peddlers without a license (which is the offence stated in the conviction,) imposes a penalty of 40*l*., and does not give the convicting magistrate any power to mitigate it. It cannot be contended that the seventeenth and twentieth sections are applicable to the same thing, for then the legislature must be supposed to have been guilty of the absurdity of imposing two different penalties for the same offence. On the other hand, it might be very reasonable to inflict a heavier punishment upon persons who do not take out a license, than upon those who merely neglect to carry it with them. The conviction was, therefore, properly quashed, and the order of sessions must be affirmed.

Oldnall Russell and *E. Alderson*, contra, were directed by the Court to confine themselves to the second *point. The sum of 40*l*. appears to have [*139 been inserted in the twentieth section by mistake, and convictions have always proceeded on the seventeenth section. It is urged for the defendant, that that section applies to those cases only where a license has been taken out, and the party trades without or contrary to it; but *Rex v. Turner*, 4 B. & A. 510, furnishes an answer to that argument. That was a conviction under the

seventeenth section, and both ABBOTT, C. J. and HOLROYD, J. observe, that the conviction was not for trading contrary to a license, but without any license at all. The seventeenth section has, therefore, been considered to apply where the party has not any license, as well as in those instances in which he neglects to carry it with him or refuses to produce it. The latter provision was necessary, in order that it might be ascertained whether the mode of trading was authorized by the license taken out. At all events it is not plain, upon this conviction, that the defendant had not a license. It may mean that he was trading without having the license about his person, and not that he had neglected to take one out, as required by the sixth section.

BAYLEY, J. There is much obscurity in the 50 G. 3, c. 41; nor is it found there for the first time. It has existed from the passing of the 29 G. 3, c. 26. The eleventh and fourteenth sections of that act are in terms the same as the seventeenth and twentieth sections of the 50 G. 3, c. 41; and in both these acts the same difficulty occurs as to imposing a penalty of 10*l.* or 40*l.* It has been contended that a person trading without a license is liable to the penalty of 40*l.*, *140] imposed by the twentieth section, and is not within the "seventeenth section, which imposes a penalty of 10*l.* If that were clear, the conviction in a penalty of 10*l.*, would be bad; but the meaning of the act should be quite plain, to induce us to come to such a conclusion, for if there be a doubt we should adopt that construction which will bear with the least hardship on the party convicted. In the seventeenth section there are three propositions: "If any such hawkers shall trade *without*, or *contrary to*, or *otherwise than as shall be allowed by* such license, he shall forfeit 10*l.*" It does not say, such hawker, "having obtained a license," and trading, &c. There are not then any words confining the operation of that section to a person having obtained a license; and the fair meaning of the words, "shall trade without such license," appears to be, "shall trade without having obtained a license." In *Rex v. Turner* this objection, if good, would have been decisive; yet it was never suggested, and in practice convictions are always for 10*l.* In the last edition of Burn's Justice a form is given in which the penalty is 10*l.*; and that is worthy of consideration, although it cannot be treated as an express authority. For these reasons I think that the words in the seventeenth section, "trading without such license," are not confined to persons who have obtained a license and travel without it. If that be the right construction, then the only question is, whether the twenty-third section exonerates the defendant from any penalty, or whether he is exempted by the proviso in the 9 & 10 W. 3, c. 27, s. 9. If the question had turned upon the 9 & 10 W. 3, c. 27 he would have been within the exemption, for that authorizes the manufacturer of goods to sell them in market towns, &c. or *elsewhere*. That, however, is not an empowering but an *141] exempting clause; *and the 29 G. 3, c. 26, which imposed a higher duty, contained the same prohibitory clause as the 9 & 10 W. 3. That being general would have entirely repealed the exemptions in the former act: but then a new proviso is introduced, differing essentially from that in 9 & 10 W. 3, c. 27, for the words, or *elsewhere*, are omitted. A similar proviso was introduced into the 50 G. 3, c. 41; and it is manifest that the words, or *elsewhere*, were omitted because the legislature thought them too large. I am therefore of opinion, that as the prohibition in the 50 G. 3, c. 41 is general, and the exempting clause confined to marts, markets, fairs, cities, boroughs, towns corporate, and market towns, the defendant was not justified in selling the articles in question in a place not coming within that enumeration.

BEST, J.(a) The act in question is certainly very obscure, but I think that both points must be determined against the defendant. As to the first, viz., the right of a manufacturer to hawk his own wares; when the 9 & 10 W. 3, c. 27, was passed the legislature intended that a manufacturer should be allowed

(a) Holroyd, J., was sitting at the Old Bailey.

to sell his own goods any where ; but the same indulgence was not extended to them by the 50 G. 3, c. 41. That limited their privileges to certain places. It has been said that the 9 & 10 W. 3, c. 27, is only repealed as to the duties ; but s. 31 of the 50 G. 3, c. 41, shows that every provision of the former act, which would be inconsistent with the latter, was intended to be repealed. But that argument is unnecessary, for the 50 G. 3, c. 41, imposes new duties ; and a person not having the license thereby required cannot hawk at all, except in those *places, and under those circumstances, particularly provided for [*142 by that act. As to the other point, it certainly appears difficult to reconcile the seventeenth and twentieth sections of the act. But I think that the defendant was at all events guilty of an offence against the seventeenth section, and was therefore liable to be convicted in a penalty of 10*l*.

Order of sessions quashed, and conviction confirmed.(a)

(a) See the next case.

The KING v. M'GILL.

A person exposing to sale and selling tea, as a hawker, without a license, is liable to the penalty imposed by the 50 G. 3, c. 41, upon hawkers trading without a license ; although even with a license, he would be liable to a penalty for selling tea in an unentered place. The defendant was convicted in a penalty of 10*l*.; *Held*, that it was the proper sum.

THE defendant was convicted under the 50 G. 3, c. 41, s. 17, for hawking tea without a license. The conviction stated, that on, &c., at, &c., the defendant was charged with being a hawker, &c., carrying to sell, and exposing to sale, without any license so to do, certain goods, to wit, divers parcels of tea ; and that he being such person, did, on the day and year aforesaid, at Worcester, carry to sell, and expose to sale, divers parcels of tea, and was then and there found trading as aforesaid, without any license so to do. The conviction then stated the evidence ; and that the justice did thereupon convict him of the same, and adjudge that he had forfeited 10*l*. Upon appeal, the justices at sessions confirmed the conviction, subject to the opinion of the Court on the following case. George M'Gill, as the agent of D. S., (which D. S. at the several times hereafter mentioned was a licensed tea-dealer,) on the 17th of April, 1822, at Worcester, carried to sell several packages of tea, and then and there, at the house of one H. G., sold *to him one of the said packages containing a quarter of a pound weight of tea ; and afterwards on the same day, G. [*143 M'Gill, as such agent, carried to sell, and exposed to sale, at the house of one W. P., another package containing also a quarter of a pound weight of tea, but did not then and there sell the same. At the several times when he, the said G. M'Gill, as such agent, so carried to sell, and exposed to sale, the said first-mentioned quarter of a pound of tea, neither he, nor D. S., his employer, had any hawkers' license according to the 50 G. 3, c. 41.

Pearson and *Oldnall Russell*, in support of the order of sessions. The objections which will be urged against the conviction are, first, that the defendant was only an agent ; and, secondly, that as a hawker cannot lawfully sell tea, even with a license, he is not liable to punishment for selling it without one. As to the first objection, *Rex v. Turner*, 4 B. & A. 510, is a decisive authority that agents are liable. With respect to the second point, if a party be charged with trading as a hawker without a license, it is no answer to say, that by the same act he offended against another statute also ; for a man may by one act commit several misdemeanours. [BEST, J. If an unqualified person kill game without taking out a license, he is liable to a penalty for so doing, although a license would not protect him from the penalty imposed upon unqualified persons.] That argument is conclusive against the defendant.

Denman and *Winter*, *contra*. It must be conceded, on the authority of *Rex*

*144] *v. Turner*, that agents are liable *to a penalty for hawking without a license. But a person cannot properly be convicted of doing that as a hawker, which by law he cannot do *as such*. By the 53 G. 3, c. 41, a license is to be taken out to enable the person to trade as a hawker, and a penalty is imposed upon those who trade as hawkers without one. The legislature must have intended to impose that penalty in those cases only where the party has dealt in some of those things the sale of which is authorized by the license. But by the 12 G. 3, c. 46, s. 6, a penalty of 10*l.* is imposed upon every person selling tea in an unentered place; and the 9 G. 2, c. 35, s. 20, made it unlawful for any hawker or pedler to sell tea. It is clear, therefore, that a hawker's license would not legalize the sale of tea by a person trading as hawker. The defendant then should have been convicted under the 12 G. 3, c. 46, s. 6; and not under the hawkers and pedlers' act, 50 G. 3, c. 41. *Cur. adv. vult.*

The judgment of the Court was, on a subsequent day during the sittings, pronounced by

BAYLEY, J. The question principally agitated in this case was, whether a person exposing tea to sale as a hawker was liable to the penalty imposed by the 50 G. 3, c. 41, upon persons trading as hawkers without a license. There was also another point which might have been raised; and upon which the Court delivered an opinion in *Rex v. Websdell*, viz., whether the penalty of 10*l.* was that which ought to have been imposed. The Court then thought 10*l.* the

*145] right penalty, and that opinion *has been confirmed by a further consideration of the subject. As to the first point, it was argued, that inasmuch as one act of parliament had made it illegal to sell tea in any but an entered place, and another had provided that no hawker should sell tea; that, therefore, a hawker was not liable to a penalty for exposing it to sale without a hawker's license. If the 50 G. 3, c. 41, had been the first act upon the subject, and no penalty had previously existed for trading as a hawker without a license, there might, perhaps, have been some doubt whether it extended to any cases in which a license would not have legalized the sale; but looking at the whole series of enactments relating to hawkers and pedlers, and taking into consideration the time when they were first prevented from selling tea, it will be plain that they are still liable to a penalty for selling it as hawkers without a license. The first enactment respecting them was the 8 & 9 W. 3, c. 25, (a) which is nearly the same as the 9 & 10 W. 3, c. 27, and contains two clauses material as to the amount of the penalty to be imposed. The 17th section of the 50 G. 3, c. 41, has this provision, "that if any such hawker shall trade as aforesaid, without, or contrary to, or otherwise than as shall be allowed by, such license, such person shall, for every such offence, forfeit the sum of 10*l.*" Three terms are there introduced, "without," "contrary to," or "otherwise than as shall be allowed by," such license; and it will hereafter appear, that those terms were advisedly introduced to apply to three descriptions of offences.

*146] Section 20, enacts, that any person may seize *any such hawker found trading without a license, or, who being found trading, shall refuse to produce a license, and have him carried before a magistrate, who is thereby authorized to convict the person so charged, and by warrant under seal to cause the *said sum* of 40*l.* to be levied. Now, that section does not expressly impose any penalty; and the 17th section, to which it apparently refers, has a penalty of 10*l.*, and not 40*l.*: it is, therefore, fair to suppose that the sum in the 20th section should have been 10*l.*, and not 40*l.*, and that the latter sum was inserted by mistake; and an examination of the earlier statutes on this subject will show clearly that such was the fact. The 19th section imposes a penalty of 40*l.* upon any person trading with a borrowed license, or one that does not contain his real name. The 8 & 9 W. 3, and 9 & 10 W. 3, c. 27, had not any such

(a) Not printed at length in the quarto edition, but in the folio edition published by order of the House of Lords.

clause; the 3d section of the latter imposed a penalty of 12*l.* upon hawkers trading "without," or "contrary to," such license as the first section requires them to take. The fifth section imposes a penalty of 50*l.* for travelling with a forged license; and the 8th section authorizes the apprehension of hawkers travelling without a license, contrary to the act, and directs that they shall be taken before a magistrate, who, if the offence be proved, shall convict them, and forthwith direct the *said sum* of 12*l.* to be levied by distress, &c. The *said sum* of 12*l.* there manifestly refers to the penalty imposed by the third section, that being the only sum of 12*l.* which had been before mentioned; and the expressions "without a license," and "contrary to the act," in the eighth section are applicable to the trading without or contrary to the license mentioned in the third section. The next act material to be considered on this point is the 25 G. 3, c. 78; but *in the mean time some alteration was made in the law as to the sale of tea and cambrics. The 10 G. 1, c. [*147 10, s. 14, provided, that tea should not be sold except in an entered place. By that provision the right to sell it was made local; the 9 G. 2, c. 35, s. 20, enacted, that it should not be sold by any hawker and pedler. The object of the statutes before cited, more particularly applying to hawkers and pedlers, appears to have been to protect domiciled tradesmen; of the two latter, to assist the collection of duties. The effect of them is, not to destroy the former prohibition against trading as a hawker without a license, but to add a cumulative penalty for hawking tea, even with a license; for the two provisions are consistent, and may well stand together. The first imposes a penalty upon persons trading at all as hawkers, without a license; the second imposes a penalty upon the sale of tea by hawkers, even with a license; and, therefore, a person who exposes tea to sale as a hawker, and has no license, offends against both the above-mentioned provisions, and is liable to a penalty for each breach of the law. The 7 G. 3, c. 43, s. 7, made cambrics found in the possession of any hawker or pedler liable to forfeiture. Then came the 25 G. 3, c. 78, as to hawkers and pedlers, the fourth section of which resembles the third of the 9 & 10 W. 3, c. 27, but has this difference: the penalty was before confined to persons trading "without" or "contrary to" the license; this enactment has the additional words "or otherwise than as shall be allowed by" such license. That expression could only be applicable to those cases in which a license would not legalize the trading. The 25 G. 3, c. 78, s. 4, alters the penalty from 12*l.* to 10*l.*; and between the fourth section, which corresponds to the third *section of the 9 & 10 W. 3, and the seventh section, which corresponds to the eighth section of the former act, introduces in s. 6, a [*148 provision, that persons trading with a borrowed license shall be liable to a penalty of 10*l.* In the seventh section, which, as in the former act, refers to the first penalty of 10*l.*, the expression *said sum* of 10*l.* is retained. The 25 G. 3, c. 78, was repealed by the 29 G. 3, c. 26, which, however, contained most of the same provisions. Thus the eleventh and fourteenth sections of the latter corresponded with the fourth and seventh of the former; the thirteenth section also of the latter corresponds with the sixth section of the former, except as to the amount of the penalty, which was raised from 10*l.* to 40*l.*; and this shows how the mistake in the fourteenth section arose. In the 25 G. 3, c. 78, two penalties of 10*l.* had been imposed in different sections preceding that in which the justice is directed to cause the *said sum* of 10*l.* to be levied. In the 29 G. 3, c. 26, one of those penalties was increased to 40*l.*; and it must have been erroneously supposed that the expression *said sum* referred to that penalty which was raised, and not to that for trading without, or contrary to, or otherwise than as allowed by, the license, which still remained a 10*l.* penalty. These sections were exactly followed in the 50 G. 3, c. 41, and in like manner the mistake crept into that act also. Upon the question, whether the defendant is liable to a penalty for selling tea, as a hawker, without a license, we are of

opinion that he is; and that the words, "otherwise than as allowed by the license," introduced into the modern acts relating to hawkers and pedlers, shows that when hawkers were prevented from selling tea even with a license, it was not intended to exempt them from the penalty before imposed upon *the sale of any goods, wares, &c., without a license. For these reasons, we think that the conviction was right.

Order of sessions confirmed.

CLARKE, Administratrix of JOHN CLARKE v. HOUGHAM.

A., by means of a misrepresentation, received of B. and several other persons, his tenants, various sums of money, to which he was not entitled. B. applied to him to have the money which he had so paid returned, saying that he and the other tenants had been induced to pay more than was due. A. replied, that if there was any mistake it should be rectified: *Held*, that this obviates the statute of limitations as to payments made by the other tenants as well as by B.

Plaintiff, an administratrix, after the death of the intestate, made one such wrongful payment as before mentioned, out of the assets: *Held*, that she might recover it in her representative character.

Upon a replication, that the defendant did promise within six years, to a plea of the statute of limitations, fraud in the defendant cannot be set up as an answer to the plea.

Quære, Whether it would be a good answer if specially replied to?

ASSUMPSIT for money had and received to the use of J. Clarke, in his lifetime, and to the use of plaintiff as *administratrix*, since his death. Pleas, first, general issue; secondly, non assumpsit *infra sex annos*. Replication, that he did promise within six years. At the trial before RICHARDS, C. B., at the last spring assizes for Kent, it appeared that the action was brought to recover the sum of 330*l.* paid to the defendant under the following circumstances. In 1802 the deceased and several other persons respectively became tenants to the defendant of several parcels of land, all of which were let at the same time at a public meeting. After the rent had been agreed upon the defendant said he would pay all the rates, and the tenants should reimburse him, as he did not wish the assessment to be disturbed. This was agreed to; and from that time to 1816 the defendant paid the rates of the several farms, and every year, before the rent-day, sent to Clarke and the other tenants an account of what would be due for rent, rates, &c. In those accounts the rates were calculated on a *supposed rental of 3*l.* 10*s.* per acre, and Clarke always paid the amount demanded. The rates actually paid by the defendant were calculated on a rental of 1*l.* 10*s.* per acre. In September, 1816, J. Clarke died; and at Michaelmas, in that year, the plaintiff, who had not then (but has since) obtained letters of administration, settled the defendant's account upon the same terms as before; the sum overpaid by her was 42*l.*, and that was within six years before the commencement of the action. It appeared that none of the tenants knew that they were paying the defendant a larger sum for rates than he actually paid, until after all the payments above mentioned had been made. In order to take the payments by deceased out of the statute of limitations, one Wilds was called as a witness, who became a tenant to defendant at the same time and upon the same terms as J. Clarke, and continued so for thirteen years. Within six years before the commencement of this action Wilds went to the defendant, and said, that he and other tenants had been paying much higher rates and cesses than they had a right to do: that defendant had charged them upon a rental of 3*l.* 10*s.* per acre, whereas the rates were assessed upon a rental of 1*l.* 10*s.* per acre. The defendant replied, that the statement must be incorrect, that he could say little about it; but that one P. was his steward and had the books, and if there was any mistake it should be rectified. On application to P., the latter said that he was not steward at the time when the land was taken, and did not know what agreement had been made about the cesses. Wilds then went a second time to the defendant, who said that he had agreed

to be responsible to the guardians of the poor for all the rates, and that the overcharge was made to reimburse himself, in case any of the tenants did not *pay him; and he refused to return the money overpaid by Wilds. [*151 Before these conversations Wilds had mentioned the matter to several of the defendant's tenants, who authorized him to speak for them; but he had not then any communication with the plaintiff. It was objected for the defendant, that this evidence was not sufficient to take the case out of the statute: first, because so far from being a promise to pay, the defendant, said he knew little about the matter, and absolutely refused to pay; secondly, because the supposed promise was not made to the plaintiff or her authorized agent. With respect to the money paid by the plaintiff it was objected, first, that it was not paid by her as administratrix, because she had not then obtained letters of administration; and, secondly, that she could not recover it back in her representative character; because if a wrongful payment, it was a *devastavit*, for which she was responsible to J. Clarke's estate, and she could recover the money in her individual capacity only. The lord chief baron reserved the points. The defendant then gave evidence to show that the rates were calculated according to an agreement made with the tenants at the time when the land was hired by them; and the steward's books were produced, by which it appeared that the rates had always been calculated upon a rental of 3*l.* 10*s.* per acre. That was left to the jury; and the plaintiff having obtained a verdict for 330*l.*, the whole sum overpaid by J. Clarke and the plaintiff. In Easter term a rule was obtained to enter a nonsuit, or have a new trial, or reduce the damages to 42*l.*, the sum overpaid by the plaintiff, on the grounds urged at the trial.

Comyn (with whom was *Gurney*) now showed cause. There is not any ground for disturbing the verdict *which has been found in this case. It [*152 was fairly left as a question to the jury, whether the over-payments were made under such circumstances of misrepresentation as entitled the plaintiff to recover. The first point reserved is, whether the claim was barred by the statute of limitations. If the transaction was fraudulent, the statute does not apply, if the discovery were within six years before the action brought. *South Sea Company v. Wymondsell*, 3 P. W. 143; *Bree v. Holbeck*, 2 Doug. 654. Or, at all events, the conversation with Wilds is an answer to the plea. As to the other objection, the money was paid out of J. Clarke's assets, and when recovered would go to his estate; the plaintiff might therefore sue in her representative capacity.

Marryat and *Bolland*, *contra*. The letters of administration were not granted to the plaintiff until after the payment was made by her. That rent became due at Michaelmas, 1816, and the intestate died before that time; the rent, therefore, was due from the plaintiff in her individual capacity. [BAYLEY, J. She might have been sued for it as administratrix or as executrix *de son tort*.] At all events the over-payment was made by her; and if a person, being the representative of another, makes a wrongful payment out of the assets, that is a *devastavit*. Com. Dig., *Administration*. (11.) And if the payment here were a *devastavit*, the money cannot be recovered by the plaintiff in her representative, although it may in her individual capacity. Per BULLER, J., in *Munt v. Stokes*, 3 East, 104. And *Ord v. Fenwick*, 4 T. R. 561, shows that the *money must be paid in the representative character, in order to enable the party to recover it in that character. *Webster v. Spencer*, 3 [*153 B. & A. 360, is not against this. That case merely decided that an executor might lend money without being guilty of a *devastavit*, which principle is also to be found in *Brown v. Litton*, 1 P. W. 141. Then as to the statute of limitations, although it has been held in equity not to apply to cases of fraud and trust until the fraud is discovered; yet at law the rule is otherwise. *Batley v. Faulkner*, 3 B. & A. 288; *Short v. M'Carthy*, 3 B. & A. 626. [BEST, J.

But here the party has been active in concealing the original fraud within six years.] That question must, at all events, be raised by a special replication. In the absence of that, the question rests upon the evidence of Wilds. Now the defendant referred him to P., who, instead of admitting any mistake, said he knew nothing about it; and then the defendant, instead of making a promise, absolutely refused to repay the money. In the first place, therefore, there was no promise; and if there were, it was not made with reference to the claim of the present plaintiff.

Comyn cited *Mountstephen v. Brooke*, 3 B. & A. 141, to show that an acknowledgment made to a third person is a sufficient answer to the statute of limitations.

BAYLEY, J. The question, how far fraud may prevent the operation of the statute of limitations, does not properly arise in this case. On the form of replication *adopted, the only question is, when did the cause of action
 *154] accrue? In order to take advantage of the fraud, there should have been a special replication. On the other ground, the point is quite clear. The statute of limitations is a bar, on the supposition, after a certain time, that a debt has been paid, and the vouchers lost. Wherever it appears by the acknowledgment of the party that it is not paid, that takes the case out of the statute. *Leaper v. Tatton*, 16 East, 420; *Douthwaite v. Tibbutt*, 5 M. & S. 75. And according to those cases, it makes no difference, whether the acknowledgment be accompanied by a promise or refusal to pay. *Mountstephen v. Brooke* shows that an acknowledgment to a third person is sufficient. Upon the evidence, then, it appears, that in 1802 the defendant had land to let, and did let it to various persons, upon certain terms. After the agreement was made as to the rent, he took upon himself to pay the rates. From that time a paper was delivered to each tenant, shortly before each rent-day, showing what was the amount of his rent and taxes. J. Clarke paid the sums demanded during his lifetime, and the plaintiff made one payment after his decease. The rent-book produced by the defendant's witness corroborated the account before given of the payments; it also showed that no correction of the mistake had ever been made: that book, therefore, helps to take the case out of the statute. But the conversation of the defendant with Wilds would of itself have been sufficient. It was not necessary that Wilds should go to him on behalf of the other tenants. If the defendant, in a conversation with him, acknowledged a mistake as to
 *155] them all, that would *obviate the statute as to all. I am, therefore, of opinion, that as to all the payments made in J. Clarke's lifetime, the case was taken out of the statute by that conversation and the steward's book. Then, as to the payment made by the plaintiff, as administratrix, I think she is entitled to recover that also. *Ord v. Fenwick* and *Webster v. Spencer*, are merely instances where an executor *can* sue, and do not show where he *cannot* sue. It has been assumed, that where the payment is a *devastavit*, the personal representative can only sue in his own name. That is a principle to which I cannot assent; on the contrary, when he discovers that he has in his representative character paid that which he ought not, he may in the same character recover it again. The money was assets; and if the suit be as executor or administrator, it will continue assets; but if the suit be in the individual capacity, the demand will be in the first instance, subject to a set-off, or when recovered will be liable to the plaintiff's debts. A *devastavit* is a wrong, and the law will not compel an executor to persevere in a wrong. Upon the whole, therefore, I am of opinion that the former payments were taken out of the statute, and that the plaintiff may recover the latter in her representative capacity.

HOLROYD, J. I am of opinion that the verdict must be sustained for the whole amount. The effect of fraud upon the statute of limitations cannot be discussed on these pleadings. The replication insists that the cause of action

arose within six years, and that is the only question. Now, although the right to recover arises out of the fraud, yet the right of action was complete as soon as the money was paid. But the case is taken out of the statute by the conversation with Wilds, who spoke of others as well as himself. The whole must be taken with reference to the claim of all the tenants. The conversation of the defendant admits, that if any wrong was done, it had not then been rectified; nor did he make any distinction between Wilds and the other tenants. That would take the case out of the statute if there were legal evidence that a wrong or mistake had been committed. The question as to that was left to the jury, and I think properly disposed of by them. As to the last point, the objection made is invalid. My brother BAYLEY has put it on a very clear ground. The money was assets, and therefore, if the payment were wrongful, was recoverable as assets. The administratrix might be liable for a devastavit, but that would not prevent her from suing as administratrix. Indeed she was bound so to sue, in order to protect the assets from a set-off for her individual debts. Both objections then fail, and the verdict must stand.

BEST, J. The jury have decided the first question in this case, viz., that a fraud was practised. To the next question it has been answered, that fraud prevents the operation of the statute of limitations. It is not necessary to decide that now, but I think that it would have done so had the replication raised the point. I do not mean to disturb any of the cases which have been cited. In them the fraud was complete more than six years before the commencement of the action; but according to the evidence in this case, there was a continuance of the fraud within six years. If that had been properly stated in the replication, I think it would have been an answer to the plea of the statute; and such appears to have been Lord MANSFIELD's opinion in *Bree v. Holbeck*. But the case was taken out of the statute by the defendant's acknowledgment, that the debt existed if the payments were wrongful. The case of *Mountstephen v. Brooke* decides, that an acknowledgment to a third person is sufficient. A promise was unnecessary; the pleadings state a promise, but that is what the law implies when an acknowledgment of the debt is proved. Then the only question is, whether the plaintiff can recover the last payment as administratrix. *Ord v. Fenwick*, and *Webster v. Spencer*, show that where the money is assets, the action may be brought in the representative character. No doubt this money will be assets, and the safest and best mode is to proceed for it in the right of the intestate.

Rule discharged.

WHITLOCK v. UNDERWOOD.

A promissory note for 40*l.*, payable to bearer generally, and therefore, in law, payable on demand, is within the first class of promissory notes in schedule, part 1, to the 55 G. 3, c. 184, and requires a 5*s.* stamp.

ASSUMPSIT on a promissory note, whereby defendant "promised to pay to plaintiff, or bearer, 40*l.*, value received." At the trial before PARK, J., at the last Spring assizes for Coventry, the note was produced, and appeared to be on a half-crown stamp; whereupon it was objected, that it should have had a five-shilling stamp by the 55 G. 3, c. 184, sched. part 1. The learned judge was of that opinion, and directed a nonsuit. A rule nisi having been obtained in Easter term to set aside the nonsuit,

*Clarke showed cause. This note being made payable generally, without naming any specific time, was in law payable on demand; it therefore falls within the first class of promissory notes in the schedule to the 55 G. 3, c. 184, and being for more than 30*l.*, and less than 50*l.*, should have been drawn upon a five-shilling stamp. The nonsuit was therefore perfectly correct.

Reader and Adams, contra. At the foot of the first class of notes in the

schedule to the 55 G. 3, c. 184, there is a memorandum, that all the notes therein enumerated may be reissued. Unless, therefore, this is a reissuable note, it is not liable to the stamp duty mentioned in that part of the schedule. There are several sections in the body of the act which show what notes are reissuable. The 14th section enacts, "that notes for any sum not exceeding 100*l.*, duly stamped according to the directions of the act, may be reissued." The 24th section requires a license to be taken out for issuing any notes "charged with a duty, and allowed to be reissued as aforesaid;" and the 27th section imposes a penalty of 100*l.* upon any person issuing without a license, any note "for money payable to bearer on demand, thereby charged with a duty and allowed to be reissued as aforesaid." Taking all those provisions together, it is manifest that the double duty only applies to notes reissuable under the statute. There is no pretence for saying that this note was intended to be reissuable. Even had it been on a proper stamp for that purpose, it could not have been reissued without complying with the 24th and 27th sections. The larger stamp was intended for those notes which were reissuable in point of law.

*159] The schedule as to bills of exchange illustrates this: "Bills of exchange to the bearer, or to order, either on demand or otherwise, not exceeding two months after date, above 30*l.*, and not exceeding 50*l.*, are to have a stamp of 2*s.* 6*d.*" That, therefore, would have been sufficient for a bill drawn in the same words as this note; and it cannot be supposed that the legislature intended to put those two descriptions of instruments on a different footing. If it be held that this note was reissuable, then it follows that notes for less than 100*l.* cannot be made payable on demand without a license; for the penalty in the 27th section is imposed upon the *issuing*, not the *reissuing*, of such notes. The 24th section makes a license necessary to issue notes payable on demand, "and which are reissuable;" now those words would be quite unnecessary if all notes payable on demand were reissuable.

BAYLEY, J. This is an extremely hard case; but, upon looking at the statute, I am satisfied that the note was not drawn upon the proper stamp. The schedule, part 1, first provides for bills of exchange, and afterwards makes distinct provisions for various kinds of promissory notes. Bills of exchange are divided into two classes: "to the bearer or to order, either on demand or otherwise, not exceeding two months after date;" and "to the bearer or order, at any time exceeding two months after date." Had the instrument before us been a bill of exchange, the half-crown stamp would have been sufficient. Then, promissory notes are divided into four classes: first, "for the payment to the bearer on demand of any sum of money, not exceeding 100*l.*;" secondly, "for the payment in any other manner than to the bearer on demand, but not exceeding two months after date or sixty days' sight, of any sum of money amounting to 40*l.*, and not exceeding 100*l.*;" thirdly, "for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days' sight, of any sum of money exceeding 100*l.*;" fourthly, "for the payment, either to the bearer or otherwise, at any time exceeding two months after date or sixty days' sight, of any sum of money amounting to 40*s.*" Now does the note in question fall within either, and which of those classes? Clearly, it is not within the second or third. If within the fourth, because drawn for an indefinite period, still it would be bad; for then it should have had a 3*s.* 6*d.* stamp. But I think it quite clear that it falls within the first division. It is payable to bearer, and in law payable on demand, and is drawn for a sum not exceeding 100*l.*; and it does not appear to me that that part of the schedule is confined to such notes as may lawfully be reissued. The schedule taken alone imposes a certain duty upon all notes drawn in a particular form, and then confers upon all such notes the privilege of being reissued. The clauses which require a license for that purpose, and impose a penalty upon unlicensed persons for issu-

ing such notes, do not in any way affect the question, as to the necessity of having any particular stamp. The nonsuit was therefore right, and this rule must be discharged.

(a) **BEST, J.** The question is, whether this note falls within any of the classes given in the schedule to the 55 G. 3, c. 184. It is payable to bearer on demand for *a less sum than 100*l*. It clearly comes within the first class. There certainly is a memorandum making the notes specified in that class re-issuable; and it has been contended, that the duties are meant to attach upon those notes alone which are issued by persons authorized to reissue them. As to the argument that bills of exchange, payable on demand, do not require so large a stamp, it is to be observed, that the legislature might very reasonably make a distinction between them and promissory notes, for bills of exchange have never been circulated as currency. I am, therefore, clearly of opinion, that the note in question was not drawn upon the proper stamp, and that the nonsuit was right. [*161]

Rule discharged.

(a) Holroyd, J., was sitting at the Old Bailey.

The KING v. The Inhabitants of BARDWELL.

The pauper was hired for a year as a shepherd: he was to have a house and garden rent-free, 7*s*. a week, and the going of thirty sheep with his master's flock, as wages. He served for two years at those wages in the parish of I., during all which time the sheep went on his master's farm, the whole of which was situated in that parish. The feed of the sheep was worth 16*l*. per annum: *Held*, that this did not confer a settlement, it not being any part of the bargain that the sheep should be pasture-fed.

Semble, That in order to gain a settlement by renting a tenement, the pauper must reside upon some part of it.

UPON an appeal against an order of two justices, for the removal of Peter Firman from the parish of Bardwell, in the county of Suffolk, to the parish of Ixworth, in the same county, the order was quashed by the sessions, subject to the opinion of this Court, upon the following case. About twenty-four years ago, the pauper, a married man, was hired for a year, by Mr. S., of Ixworth, as his shepherd; he was to have a house and garden rent-free, seven shillings a week, and the going of thirty sheep with his master's flock as wages. [*162] *The pauper lived for two years with Mr. S., in the parish of Ixworth, at these wages, during all which time the thirty sheep went with his master's flock on the farm, the whole of which was situated in that parish. The feed of the thirty sheep was worth 16*l*. a year, exclusive of the house and garden. If the pauper had not been allowed to keep the sheep he must have had more wages.

Storks, in support of the order of sessions, was stopped by the Court.

Dover, contra. The pauper gained a settlement in Ixworth, by the going of the thirty sheep with his master's flock. It has been frequently decided that the liberty to take the profits of land by the mouths of cattle is a tenement within the 13 & 14 Charles 2, c. 12, and in the present case that right is found to have been worth 16*l*. per annum. *Rex v. Melkridge*, 1 T. R. 598, shows that payment by service is equivalent to payment in money. The pauper therefore may be said to have rented a tenement of more than 10*l*. annual value, *Rex v. Minster*, 3 M. & S. 276. [BAYLEY, J. Is there any case, except *Rex v. Minster*, where the pauper gained a settlement by renting a tenement without residing upon any part of it?] *Rex v. Houghton le Spring*, 1 East, 247, and *Rex v. Sowton*, Burr. S. C. 125.

BAYLEY, J. This case certainly comes very near *Rex v. Minster*, but that is open to much observation. It was there conceded that the right to have the cows fed upon the master's farm was a tenement, and the *only question discussed and decided was, the nature of the consideration given for that [*162]

tenement. In *Rex v. Oswald Twistle*, decided in Michaelmas term, 1818, it was held, that unless it was stipulated in the original bargain, that the cows should be pasture-fed, a settlement would not be gained, and that decision was recognised and acted upon in *Rex v. Sutton St. Edmunds*, 1 B. & C. 536. In the present case it is probable that the sheep were fed upon growing produce, to the value of 10*l.* per annum; but as it was not any part of the original bargain that they should be so fed, it falls expressly within those two cases, and is not sufficient to confer a settlement. There is another point also which makes it extremely doubtful whether the pauper could have gained a settlement, had the going of the sheep constituted a tenement of 10*l.* annual value. The house and garden being merely for the more convenient performance of the pauper's service as shepherd, must be laid out of consideration; he did not occupy them as a tenant, but as a servant. The statute 13 & 14 Car. 2, c. 12, requires that the party should come to *settle* on the tenement: now that means to reside. In all the cases determined on this part of the act the pauper resided upon some part of that which constituted the tenement. There are cases where a party, from kindness, was allowed to reside in a house, rent free, that was held to be a tenement. But here the pauper had no residence but in the character of a servant; the house continued the master's, and the pauper was, with respect to this point, in the same situation as if he had lived in a room in his master's house. The two cases referred to differ from this, for in each of them the pauper had property of his own in the parish, and was on that

*164] ground held to be irremovable. *Rex v. Denbigh*, 5 East, 333, also, is distinguishable, for there the pauper lived in the toll-house, as his own residence; and it would have been such a tenement as would confer a settlement, but for an act of parliament which says, that no gatekeeper shall gain a settlement by renting the tolls and residing in the toll-house, 13 G. 3, c. 84, s. 56. For these reasons I think that the pauper did not gain a settlement in Ixworth, and that the order of sessions must be confirmed.

BEST, J.(a) In *Rex v. Minster*, the principal point was given up, viz., whether the feeding of the cows constituted a tenement; but the Court there thought that a house occupied by the pauper, merely as a servant, did not constitute a tenement. Here there was not any agreement that the sheep should be fed on growing produce; this case, therefore, falls within *Rex v. Oswald Twistle*, and *Rex v. Sutton St. Edmunds*. I agree, also, that the pauper, to gain a settlement, must reside upon some part of the tenement. I am not, indeed, aware of any express decision to that effect; but looking at the words of the statute it appears, that merely having a tenement of a certain value will not do, the pauper must come to *settle* upon it. The legislature could not have intended mere residence as a servant, but that the party should gain credit and reside as a tenant. If that be so, the pauper, on this ground also, gained no settlement in Ixworth.

Order of sessions confirmed.(b)

(a) Holroyd, J., was sitting at the Old Bailey.

(b) The necessity of the pauper's residence upon some part of the tenement does not appear to have been much considered in former cases. "In most of them, indeed, it does appear that he so resided, but that was not insisted upon as necessary. Thus in *Rex v. Butley*, Burr. S. C. 107, the pauper rented a house in which he resided; but Page and Probyn, Js., seem to rely upon his residence being in the parish, and not upon its being on the tenement. So in *Rex v. Shearston*, Burr. S. C. 474, Lord Mansfield speaks of a residence in the parish as necessary. Dennison and Wilmot, Js., advert to the fact of the pauper's residence being on the tenement; the latter of them observes, "It is settled that the residence upon a part of the different takings is sufficient to gain a man a settlement in the parish where he resides." In *Rex v. Llandeceras*, Burr. S. C. 571, the pauper did in fact reside upon a part of the tenement; but Aston, J., says, "The pauper need not reside upon any part of the tenement he takes; it is enough if he resides in the parish." It does not, however, appear that the rest of the Court (Lord Mansfield, C. J., Yates and Hewitt, Js.) expressed any such opinion. In *Rex v. Old Alresford*, 1 T. R. 358; *Rex v. Stoke*, 2 T. R. 451; *Rex v. Peddithrethide*, 3 T. R. 772; *Rex v. Brampton*, 4 T. R. 348; *Rex v. Tolpuddle*, 4 T. R. 671, the point does not appear to have been noticed: in the two former the pauper did reside upon a part of the thing taken; in the three latter it does not

appear whether the fact was so or not. In *Rex v. Knighton*, 2 T. R. 48, the pauper did not reside in the parish where the tenement was situated; and Ashurst, J., who delivered the judgment of the Court, says, "There must be a residence either on the premises, or at least in the parish where some part of the premises lies." Throughout this series of cases it appears that the principal discussion was respecting the nature of the thing taken, and its value; the meaning of the expression "shall come to settle," in the 13 & 14 Car. 2, c. 12, was lost sight of; and perhaps it was not strictly attended to in those cases where it was held that various takings in different parishes confer a settlement in that parish where the pauper resides, if the aggregate value be 10*l.* per annum.

*The KING v. The Inhabitants of MACHYNLLETH and PENNEGOES. [*166

An indictment stated that an ancient bridge, situate within the parishes of Machynlleth and Pennegoes, was out of repair, and that the inhabitants of the said parish of Pennegoes and town of Machynlleth *aforesaid*, from time immemorial, by reason of the tenure of certain lands in the said parish of Pennegoes and town of Machynlleth, have repaired the bridges: *Held*, upon error, that the indictment was bad, because it did not appear that the bridge was situate within the town, and therefore that the inhabitants of the town were not liable, unless a special consideration were shown; and that here no sufficient consideration was shown, inasmuch as the inhabitants could not hold land, and therefore could not be liable by reason of law.

THIS was a writ of error upon a judgment of the court of quarter sessions, for the county of Montgomery, upon an indictment for not repairing a bridge; which charged, that a certain ancient bridge over the river Diflas, commonly called Pontfelingerrig bridge, and situate within the parishes of Machynlleth and Pennegoes, in the said county of Montgomery, on the king's highway there, the same being from the time whereof the memory of man is not to the contrary, a common king's highway used for all the king's subjects, with their horses, coaches, carts, and carriages, to go, return, and pass at their will and pleasure, on, &c., and for the space of two years thence next following, was very ruinous, &c., for want of due reparation thereof, so that the subjects of the king, with their horses, &c., could not pass as they ought, and were wont to do. The indictment then stated, that the inhabitants of the said parish of Pennegoes, and the inhabitants of the said town of Machynlleth *aforesaid*, in the said county of Montgomery, from the time whereof, &c., and by reason of the tenure of their lands and tenements in the said parish of Pennegoes and town of Machynlleth, have repaired, &c., the said bridge, &c. It was then alleged upon the record, that A. B., of the said parish of Pennegoes, and C. D., of the said town of Machynlleth, two of the inhabitants of the said parish of Pennegoes and the town of Machynlleth came into court, and pleaded not guilty. The trial of the indictment was then stated, and that defendants were found guilty; and that it was adjudged that the said inhabitants in the indictment specified should pay a fine of 400*l.* The following errors were assigned: first, that the inhabitants of the parish of Pennegoes, and the inhabitants of the town of Machynlleth, were stated to be jointly liable to the repair of the bridge; and, secondly, that it was not stated in the indictment that any part of the bridge was within the town, or that the inhabitants of the parish of Pennegoes, and the inhabitants of the town of Machynlleth, were a body corporate. The case was now argued by

Sir William Owen. The offence charged, is the non-repair of the whole bridge, which arises not from the joint neglect of the two bodies, but from the separate neglect of each. The offence, therefore, should be charged *separaliter*, or in separate indictments. 2 Hale's P. C. 174; Hawkins' P. C. b. 2, c. 25, s. 89; *Rex v. Kingston*, 8 East, 41; *Rex v. St. Pancras*, Peake's N. P. C. 219. Secondly, the bridge is charged to be in the parish of Pennegoes and Machynlleth; but no part of it is stated to be in the town of Machynlleth, non constat that the town and the parish are co-extensive, or that the town is in the parish; and it is clear, that the inhabitants of a town would not be bound to repair a bridge situated out of the town, *Rex v. The Inhabitants of Gamlingay*, 3 T. R. 513. And *Rex v. St. Giles, Cambridge*, 5 M. & S. 260, is an authority to

show, that in order to charge a parish for the repair of a road situate out of the parish, a consideration must be shown. The effect *of this indictment *169] is to charge the inhabitants of a town to repair a bridge situate out of the town. Thirdly, the inhabitants of the county being liable to repair, the inhabitants of a township cannot be liable to repair by reason of the tenure of lands, because, as inhabitants, they cannot hold lands. *Ireland and Free Borough case*, 12 Co. Rep. 121; *Viner's Abr., Corporation*, (E.) And they cannot be intended to be a corporation by the name of inhabitants. *College of Physicians v. Salmon*, 1 Ld. Raym. 680, and *Anonymous*, 1 Salk. 191. [He was then stopped by the Court.]

Campbell, contra. It must be taken upon this record, that the bridge is within the town, or that the inhabitants of the parish and town are liable by tenure. The indictment charges a joint obligation of the parish and township to repair, and if so, a neglect to repair constitutes a joint offence. [BAYLEY, J. Can you show that the inhabitants of a town can in any case be bound to repair a bridge situate out of the town.] The indictment charges that the bridge is situate within the two parishes, and then that the inhabitants of the parish, and the inhabitants of the town of Machynlleth *aforesaid* have been used to repair. Now there is no other Machynlleth mentioned before, but the parish, and the word "aforesaid" must therefore refer to the parish of Machynlleth, and the word "town" may be rejected as surplusage. But assuming that the bridge does not appear to be within the town, the indictment is still good; for the offence is not charged to be by reason of the common law liability, but by reason *169] of the tenure, and the *inhabitants of the parish and of the township may be liable by reason of a joint tenure of the same lands.

BAYLEY, J. The objection to this indictment is fatal. The bridge is described as situate within the parishes of Machynlleth and Pennegoes. But the parishes are not alleged to be within the town. And unless the bridge be situate within the town, the inhabitants of the town would not be liable unless a special consideration be shown. And here they cannot in their character of inhabitants be liable by reason of the tenure of lands. For they cannot as such hold lands.

HOLROYD, J. It is quite clear that the judgment cannot be supported. The word *town* cannot be rejected, and if it could, it would not then appear upon the record that any person came to defend for the parish of Machynlleth.

BEST, J. The case of *The King v. The Inhabitants of St. Giles, Cambridge*, is an authority to show that the inhabitants of a township cannot be liable for the repair of a road situate out of the township, unless a consideration for such repair be shown. Here that is attempted to be shown, by alleging that the inhabitants of the parish and the town were liable by reason of the tenure of certain lands, but as inhabitants they could not hold lands, and it is not shown that they are incorporated. The consideration, therefore, fails, and it not being shown that the bridge was within the town, the common law liability does not attach, and therefore the judgment cannot be supported.

Judgment reversed.

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*CARGEY v. JAMES AITCHESON.

The declaration stated that the plaintiff and defendant, by articles of agreement, (reciting that several actions, arising out of the same transaction, had been brought, and defended by the plaintiff, defendant, G. A. and D. A., and that in one of them the assignees of one J. T., a bankrupt, recovered against the now plaintiff 2,500*l.*, and that disputes existed between the now plaintiff and defendant respecting the value of the goods and stock which each had received from a certain farm, and also concerning the proportion which each was to pay of the said sum of 2,500*l.* according to an agreement entered into between them before the trial, and also concerning the costs of bringing and defending the actions above mentioned.) submitted themselves to the award of J. T., J. R., T. C., respecting the said matters. That the arbitrators, taking the said matters into consideration, awarded that the defendant should pay the plaintiff 444*l.*; that five-eighths parts of the costs of the several actions before mentioned should be paid by the plaintiff, and three-eighths by defendant; that the sums already expended by

either of them should be allowed as part payment of his proportion; and that when the sum of 444*l.* and the costs were paid, mutual releases should be given. On demurrer: *Held*, that the plaintiff was entitled to recover; for that, as to the first part of the award, nothing appeared on the declaration to show that the arbitrators had not awarded the sum of 444*l.* after taking into consideration the value of the stock and goods, and that it was sufficiently certain; for the plaintiff being originally liable to pay the whole sum of 2,500*l.*, must remain liable to pay all but the 444*l.* awarded to him. As to the second part respecting the costs: *Held*, that it was sufficiently certain, for it would become so upon taxation of the costs by the proper officer; and that it would be final or otherwise according as there were or were not disputes about the sums already laid out. If there were any such disputes, or if the arbitrators did not take into consideration all the matters referred, that should have been pleaded.

DEBT on an award. The declaration stated that certain differences having arisen, and being between the plaintiff and defendant, on, &c., at, &c., by articles of agreement made between the plaintiff of the one part, and the defendant of the other part; reciting, that an action was then lately depending in the Court of King's Bench, between Cargey as plaintiff, and one Thomas Purvis, defendant, which cause came on to be tried at the then last assizes for Northumberland, upon which a verdict was given for the defendant; and reciting also, that another action was depending in the said court, wherein the assignees of John Tarleton, a bankrupt, were plaintiffs, and the said plaintiff was defendant, and which last mentioned action came on to be tried at the same assizes; and reciting also, that there were several actions depending between the said assignees and the said defendant in the present action, George Aitcheson, and David Aitcheson, relating to the same transaction; *and reciting [*171] also, that it was agreed that a judgment in the action by the said assignees against the plaintiff, should be recorded for the plaintiffs with 4000*l.* damages; and that a rule of court was drawn up, that upon payment of 2,500*l.* to the plaintiffs, and immediate possession of a certain farm at Great Ryle, in the county of Northumberland, delivered by the said G. A. and D. A., the tenants thereof to their landlords, the said judgment should be satisfied; that all the actions pending for the same transactions should be no further proceeded in, and that each party should pay his own costs; and reciting also, that divers disputes and differences had arisen between the said plaintiff and the said defendant in this suit, about the value of the stock and goods which each of them received into their custody from the said farm, and their keep and feeding by the plaintiff in this action; and also concerning the sums, which, according to an agreement entered into between them before the said assizes, they respectively should contribute towards the payment of the 2,500*l.*, and the costs incurred in bringing and defending the said actions brought and defended by the now plaintiff and defendant, G. A. and D. A.; and that, in order that the said differences might be amicably settled, the plaintiff and defendant in this suit had agreed to refer the same to J. T., J. R., and T. C., as thereafter mentioned: it was witnessed, that, for ending all disputes and differences between the said parties thereto, the plaintiff did thereby covenant with the defendant, and the defendant did thereby covenant with the plaintiff, that they, the plaintiff and defendant, would truly perform the award of the said J. T., J. R., and T. C., of and concerning the said matters in difference: the declaration then averred *the [*172] making of an award by the arbitrators, which award, after reciting the articles of agreement, was as follows: We, the said J. R., J. T., and T. C., having taken upon ourselves the burden of the arbitrations, and having heard and weighed the allegations of both the parties concerning the matters so in difference as aforesaid, and examined the various vouchers, documents, and evidence, relative thereto, do, by these presents, in writing under our respective hands, award that all disputes and differences now or heretofore subsisting between them, or between the said Gilbert Cargey and James Aitcheson, relative to the matters referred to us by the articles of agreement, shall henceforth cease and determine. And we further award that the said James Aitcheson do and shall pay unto the said Gilbert Cargey on, &c., the sum of 444*l.* And we do

hereby further award that the said Gilbert Cargey shall pay or cause to be paid five eighth parts, and the said James Aitcheson shall pay three eighth parts of all costs incurred either in prosecuting the action brought by the said G. Cargey against T. Purvis, or of defending the several actions wherein the assignees of J. Tarleton, a bankrupt, were plaintiffs, and the said Gilbert Cargey, James Aitcheson, G. A. and D. A. were defendants, or any or either of them. And we further award, that all such sums of money as the said Gilbert Cargey and James Aitcheson have already paid, laid out, and expended, for and towards, or on account of the said suits, or either or any of them, or any way connected therewith, shall be considered and deemed as part payment of their respective shares, according to the proportions above mentioned. And we further award, *173] that all *expenses attending this arbitration and of these presents, shall be paid and satisfied by the said Gilbert Cargey and James Aitcheson, in equal shares and proportions; and lastly, we further award, that the said Gilbert Cargey and James Aitcheson shall, upon payment of the sum of 444*l.*, and the costs, charges, and expenses of the said several suits, and the charges and expenses of this arbitration, execute unto each other mutual and general releases and discharges of all actions, &c., relating to the premises so referred, or any of them, from the beginning of the world to the day of the date of the said hereinbefore in part recited articles of agreement. Breach, non-payment of the sum of 444*l.* Demurrer and joinder.

F. Pollock, in support of the demurrer. The award is bad for two reasons; first, it is not in pursuance of the submission; and, secondly, it is not final. The direction, that the defendant should pay a specific sum, is not in pursuance of the authority given to the arbitrators, which was, that they should determine what was the value of the stock and goods taken from the farm, and what each should contribute towards the sum of 2,500*l.* and costs. It was not competent for them to get rid of the calculation by awarding that one party should pay a certain sum, nor by giving proportions whereby a calculation should be made respecting the costs and expenses. In *Matthews v. Price*, in C. B. (not yet reported) the submission was that an estimate of certain expenses should be made, and a sum certain being awarded, that was held bad. Then the direction in the award, that the sums already expended should be taken, as part of *174] the proportions to be paid is not final, but *must be matter of future reference, so that there could be no end of the discussion. Besides if either party had already advanced more than his proportion, no remedy is provided for him.

Wightman, contra. The plaintiff, Cargey, was originally liable to pay the entire sum of 2,500*l.* The award, therefore, by stating that the defendant shall pay 444*l.* does, in fact, fix the proportion which each shall pay, for Cargey must discharge the residue. This part of it, then, is certain, and according to the submission. The remainder of the submission was as to the costs and expenses, and the arbitrators have awarded that they shall be borne in certain proportions. It was impossible for them to render that part of the award more certain, until the costs were taxed; and as the taxation will make that part of the award certain, the rule *id certum est quod certum reddi potest* applies. *Beale v. Beale*, 1 Roll. Abr. 251, pl. 14; *Hanson v. Liversedge*, 2 Ventr. 242. With respect to that part of the award which directs that the sums already expended shall be allowed in the calculation, that either relates to the costs, and is therefore sufficiently certain and final, or it is beyond the submission, and if so, it cannot vitiate that part of the award which is according to the submission. After payment of the sum of 444*l.*, and the proportion of the costs, the plaintiff could have no further demand against the defendant, for then the award directs, that mutual releases shall be executed. *Bargrave v. Atkins*, 3 Lev. 413. The plaintiff is therefore clearly entitled to recover the sum of 444*l.*, which is the whole of the demand in the present action.

**Pollock*, in reply. The cases cited are distinguishable from this, for where the submission does not point out the matters in dispute, they must be shown by evidence; but here certain matters were pointed out by the submission, and if the arbitrators have not decided on the whole of them the award is bad. Personal expenses were within the submission; if it be uncertain whether the arbitrators took them into consideration, the award is bad on that ground; if it be admitted that they were taken into consideration, the award is bad, not being final in that part of it. [*175]

BAYLEY, J. I am of opinion that the plaintiff is entitled to recover. The action is on an award set out in the declaration, and the plaintiff will be entitled to recover on that part of the award, whereupon a breach is assigned, unless the Court can see that it is bad. It is alleged to be contrary to the submission, and not final; but it is necessary for the defendant to make out the objection, and to make it out by something appearing on the face of the declaration. Whether any fresh facts might have been stated, which would have helped to support the objection, is not a question before the Court, for we can only look to the pleadings. Now the matters submitted are, the value of the stock and goods which each of the parties received into his custody, and their keep and feeding by the plaintiff, the sum or sums which, according to an agreement entered into between them, they should respectively contribute towards the payment of the said sum of 2,500*l.*, and the costs incurred in bringing and defending certain actions. The plaintiff would be bound to pay the whole sum of 2,500*l.*, the judgment being against him, and must now discharge all but the part awarded to him. The award imports, that the arbitrators have taken into consideration the matters in difference, and they first award, that all disputes shall cease, then that the defendant shall pay a certain sum. That imports, that the arbitrators taking into consideration the value of the goods, the stock, and their keep, and feeding, thought that the defendant ought to pay 444*l.* We cannot presume that they omitted any thing, and must therefore conclude that 444*l.* was the proportion which the defendant was to pay of the 2,500*l.*, taking all the other ingredients into the account. Then, is the other part of the award final? The submission is of the costs and expenses incurred in bringing and defending certain actions. Now the sum to be paid might be ascertained either by fixing it in the award, or referring it to an officer whose duty it is to say what shall be the whole sum paid for costs. Perhaps justice could only be done by fixing the proportion which each should contribute; for the award was to be made within a limited time, and the costs might not then be taxed. It has been observed that the agreement referred to should have been shown; but the defendant might have pleaded that, if there were any thing in it which would vitiate the award. In the absence of any such plea, we cannot presume any thing against the award. Another objection made was, that the award directs that the sums already expended shall be allowed as part of the proportions to be borne by each. That would make the award final or otherwise, according as there were or were not disputes about the amount expended. If it were a matter of controversy, the defendant might have pleaded it. In the absence of any such allegation, it does not appear that there was any controversy upon that point. The objection therefore fails; and the award being good as to the 444*l.*, the plaintiff is entitled to judgment in his favour. [*177]

HOLROYD, J. The award cannot, upon these pleadings, be considered not final. That must either appear upon the face of the award, or by facts stated in a plea. It does not appear upon the face of the award. The decision of the arbitrators may have embraced all the matters in dispute mentioned in the submission. The sum of 444*l.* may have been awarded to the plaintiff upon the disputes, as to the value of the goods and stock, their keep, and the 2,500*l.*; and it appearing by the submission that the plaintiff was the person from whom

that sum was recovered, he must of course pay the residue, the award is therefore final as to that, and according to the submission. If there were other facts not taken into consideration, that should have been shown by a plea. The other objection resolves itself into the same question, whether the award be final or not. The dispute might be as to the proportion of the costs which should be borne by each party. The arbitrators have decided that; but by law the costs are to be taxed by an officer of the court, and, therefore, although the arbitrators have not determined the amount, that is not a valid objection to the award. Had they awarded that the whole of the costs should be paid by one party, that would have been good without ascertaining the amount; and the award is consequently good, awarding that they shall be borne by the two parties in certain proportions. If it had been alleged in a plea that the sums *178] already expended were a matter in controversy, that might have vitiated the award. But upon a demurrer to the declaration, we must say that the objections are not established; if that could have been done by extrinsic evidence, it should have been pleaded.

BEST, J. An award should always be supported, unless there be some unanswerable objection to it. It is said that this award is uncertain, and not final; uncertain as to the 444*l.*, but that is not so. The question submitted was, what proportion of the 2,500*l.* should be borne by the defendant. After payment of the 444*l.*, and the execution of the releases awarded, all discussion as to that must end; the award is therefore certain. But then it is urged, that if the award be not final in another part, it is altogether void; and it is argued that the award is not final as to the costs and the mode of paying them. As to the costs, the award directing that each shall bear a certain proportion, is final. As to the mode of paying them, viz., by allowing the moneys already expended as part, I think that was not within the submission, and therefore cannot vitiate the award. The submission was, of the costs to be paid, not of the mode of paying them. The general rule, that the arbitrators shall fix the sum to be paid, is not applicable to costs; for the arbitrator is not competent to ascertain them, and there is an officer of the court appointed for that purpose. It is therefore sufficient if the proportions are fixed. For these reasons the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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*CATHERINE GREIG v. TALBOT.

Debt on a bond conditioned for the performance of an award, to be made within a limited time. The declaration, after setting out the condition, stated that before that time expired, the parties to the bond, by deed, agreed to give the arbitrators further time for making the award, and that an award was made within the extended time; and alleged non-performance: *Held*, upon demurrer, that the action was maintainable upon the bond.

DECLARATION upon a bond, whereby the defendant, one W. Redman, and G. Moth, became jointly and severally bound to the plaintiff in 1000*l.* The condition which was set out in the declaration was, that one W. Redman and one G. Moth, and each of them, should abide by the award of J. C., T. H., and D. M., elected and chosen as well on the part of the said W. Redman and G. Moth, as of the said plaintiff, to be made on or before the 1st of February. Averment, that after the making of the writing obligatory, with the said condition, and before the 1st day of February, in the condition mentioned, to wit, on, &c., each of them, the said W. Redman, and G. Moth, and the said defendant, by a certain deed-poll, under his hand, and sealed with his seal, endorsed on the back of the said writing obligatory, and by each of them respectively delivered to the plaintiff, and the plaintiff, by her certain deed-pool, under her hand and seal, delivered to W. Redman, G. Moth, and the defendant, did give and grant unto the said J. C., T. H., and D. M., the arbitrators in the condition of the said writing obligatory mentioned, further time for making their award of and con-

cerning the several matters by the said condition of the said writing obligatory referred to them, until the 1st of March then next, so that they, or any two of them, made their award on that day. Averment, that the arbitrators accepted the reference, and before the 1st of March made their award, which was set out; and *non-performance of the award by Redman and Moth was averred. [*180 To this declaration the defendant demurred, and assigned for cause, that the award was not made within the time limited by the condition of the bond. The case was now argued by

Bayly, for the plaintiff. It is necessary to make out two points, in order to sustain this declaration. First, that where a bond or other thing executory is made subject to a defeasance, that may afterwards be altered altogether, or in part. Secondly, that the endorsement upon the bond, in this case, operates as a new defeasance, superseding the former one so far as relates to the time of making the award, and in point of legal effect incorporating in itself all the terms of the original condition to which it has reference, and applying them to such enlarged time. As to the first point, it is laid down in Co. Lit. 237 a, "that rents, annuities, conditions, warranties, and such like, that be inheritances executory, may be defeated by defeasance made either at the time, or any time after. So the law is of statutes, recognisances, obligations, and other things executory." And 1 Rolle's Abr. 590, D. 45, and Vin. Abr., *Dq.* (D) 2, are authorities to show that if a defeasance of a statute be made, and after another defeasance is made, the first defeasance is void thereby, and the second only is in force. In *Holford v. Andrews*, Moore, 573, it is said to have been agreed by the Court, that a new defeasance may be made to an obligation, with condition, but then it must be by writing. In *Hodges v. Smith*, Cro. Eliz. 623, it was held in an action of debt on bond, that a defeasance by indenture, made subsequent *to the bond to which it related, might be pleaded in [*181 bar. In the case of *Pardons*, 8 Co. 13, this case is stated. "A. was bound in a statute of 20l. to B.; B. sued execution, and the land of A. was delivered to B. in execution, till he should have levied the 20l., and afterwards B. made a defeasance to A. by indenture, that if A. paid him 8l. at a certain day, then the recognisance, viz., the statute for 20l., should be void; and it was adjudged, that although the statute was executed, yet the defeasance of the statute was sufficient in law to defeat as well the statute as the execution upon it; for the statute is the foundation of the whole, and, therefore, if that is defeated, all that is built upon it shall be defeated also." In *Shepp. Touch*. 298, it is laid down, that "if one make a lease for life, by deed, and afterwards, by another deed, grant to his lessee, that he shall not be impeached for waste, this is a good discharge; and if the lessee afterwards grant by deed to the lessor, that if he shall bring an action of waste against the lessee, that he will not make use, nor take advantage, of the deed of discharge, this is a good defeasance of the discharge: so that hereby it seems that a defeasance may be of a defeasance, and one defeasance after another, and regularly the last shall stand:" and several other cases are there put in illustration of this principle. These authorities fully establish that deeds and defeasances may be altered by subsequent instruments of the like or as high a nature; and that where there are two defeasances to the same instrument, the latter shall stand. Here, then, the second defeasance must stand; but as that by reference to the former defeasance, in effect, incorporates in itself all the terms of it, the only variation made is as to the time within which the award was to be made. [*182 *Evans v. Thompson*, 5 East, 189, expressly shows that such is the legal effect of the second deed; and that being so, then the first defeasance, subject to a fresh limitation as to the time of making the award, stands as a new defeasance to the bond. It may be said that the plaintiff must seek her remedy by an action of covenant on the deed, the bond being no longer in force. But it never could have been intended to substitute the deed in lieu of the bond; for the de-

fendant, who was a mere surety, could be liable upon the bond only to the extent of the penalty; whereas, if the second deed is to operate in lieu of the bond, as the only security for the performance of the award, and the defendant may be sued in covenant, he may then be liable to any extent. It must, therefore, have been the intention of the parties, that the bond should continue in force, subject to a new defeasance, for the performance of an award within the enlarged time. *Brown v. Goodman*, 3 T. R. 592, n. does not govern this case; there the submission was by deed. The consent to enlarge the time was by parol, and therefore not sufficient. And that is stated to have been the very ground of the decision, by GIBBS, C. J., (who had himself been counsel in the case,) in delivering the judgment of the Court in *Thompson v. Brown*, 7 Taunt. 654.

Carter. The authorities cited only establish, that agreements, by whatever instruments they are made, may be varied by subsequent instruments of the like nature; but prove nothing as to the form of the action in which the parties may have their remedy for a breach of the agreement. In such cases, *183] the action for a breach of the new agreement must be founded upon the subsequent, and not upon the original instrument. Here it may be conceded, that an action might be maintained upon the deed-poll, for not performing the award made within the extended time, and yet no action is maintainable upon the bond. That was made subject to a condition which has never been broken; and therefore the bond has never become forfeited, and, consequently, the penalty has never become a debt. It is enough for the defendant to show that this action on the bond cannot be maintained; he is not bound to contend that the plaintiff is without remedy. The case of *Brown v. Goodman*, 3 T. R. 592, n. is expressly in point. In that case Lord KENYON took this distinction, that although the plaintiff might have some remedy, he had not any remedy upon the bond by which the defendant bound himself, under a penalty, to abide by an award, if made within a given time. That penalty could never extend to an award made after that time under a new agreement. If, to a declaration on the bond, the defendant, after setting out the condition on oyer, had pleaded no award made, and the plaintiff had replied the deed-poll, that would have been a departure. *Evans v. Thompson* does not govern this case, for that was decided upon a motion for an attachment. No question arose as to the manner in which the party must have shaped his action, if he had sought his remedy by that mode of proceeding.

BAYLEY, J. I am now satisfied, by the argument, and by the authorities cited, that the plaintiff is entitled to recover upon the declaration as it stands. *184] This is an action upon a bond, the condition of which was, originally, for the performance of an award to be made, on or before the 1st of February: no award was made within that time; but before the 1st of February, and while the bond still remained in force, an agreement under seal was executed by each of the parties named in the bond, by which they gave to the arbitrators further time, until the 1st March, to make their award; and the question is, what is the legal effect of the second deed? Is it merely to give a remedy upon that deed, or is it, in substance, to vary the day mentioned in the condition of the bond, and to introduce, as a term into that condition, the extended period of time for making the award? The words import, that all the parties are to be placed in the same situation as if that extended period had been inserted in the original condition. The authorities cited in the argument establish most clearly, that deeds or defeasances may be altered by subsequent instruments of the like or as high a nature; and the question is, in this case, whether the parties have, by the second deed, merely varied the terms of the condition of the defeasance, or whether they have substituted the second deed in lieu of the bond, as a new and independent agreement of reference. It has been argued, that it was the intention of the parties, when they executed the

second deed, to substitute it instead of the bond, as the only security for the performance of the award. I cannot think that that was the intention. The deed, in express terms, refers to the condition of the bond, and further time is given to the arbitrators named in that condition to make their award concerning the matters referred by the condition of the bond. The parties, then, must have considered the condition of the bond as containing the only agreement to refer; and *they must, therefore, have intended only to introduce a new term [*185 into that agreement by the subsequent deed. The deed was executed by all the parties to the bond. Now it appears that one of the arbitrators was named on the part of the plaintiff, and the other on the part of Redman and Moth. The defendant, therefore, must have been a surety, and if so, could have been affected by the bond only; he could not have been called upon to execute the second deed, for any other reason than that he should continue liable upon the bond. I am, therefore, perfectly satisfied, that it was the intention of the parties to vary the defeasance only, and to keep the bond in force as a subsisting security; and there being no authority to show that such a deed may not apply to a defeasance only, without affecting the bond, I am of opinion that the legal effect of the second deed was to continue the bond in force, subject to a defeasance for the performance of an award within the extended time, and, consequently, that this action is maintainable. This case is distinguishable from *Brown v. Goodman*, because there the submission was by deed, and it did not appear that the consent to enlarge the term was by deed; and if not, it could not continue the effect of the preceding deed, and, consequently, would not suffice to give a remedy upon the bond, although it might leave the party a remedy for the breach of the parol contract. *Evans v. Thompson* is a strong case, and an authority expressly in point. There the submission was by bond, the condition of which was for the performance of an award to be made within a given time; and before that time expired, the parties by an agreement endorsed upon the bond consented to enlarge the time. There was a term in the condition of the bond, that the submission should be made a rule of court; [*186 but when the time for making the award was agreed to be enlarged by the endorsement, it was not added that that should be made a rule of court. The award was made within the enlarged time, but not within the time mentioned in the condition of the bond. A rule reciting the bonds of submission, and the agreement that they should be made a rule of court, and the agreement to enlarge the time, directed that the *same* should be made a rule of court. An attachment having issued for the non-performance of the award, a rule nisi was obtained for amending the rule of court, by confining it to the submission made by the bond and condition, and excluding the endorsement. After argument and consultation with the judges of the other courts, it was held that the agreement to enlarge the time was to be considered as virtually incorporating in it by reference all the antecedent agreements, between the parties, relative to that subject, as if the same had been formally set forth and repeated therein; and among the rest, the agreement that the submission should be made a rule of court, and that with reference to the enlarged time, instead of the time originally specified in the condition of the bond. Upon the authority of that case the deed-poll here may be considered as virtually incorporating in it all the antecedent terms contained in the condition of the bond (with the alteration of the time within which the award was to be made;) and then, according to the authorities cited, it may stand as a defeasance to the bond substituted in lieu of the original condition. The only difference between this case and that of *Evans v. Thompson* is, that there the Court thought that the enlargement incorporated in it all the antecedent agreements between the parties, and gave a remedy by attachment. Here, we hold that the *deed-poll incorporates in it all the [*187 terms of the original condition, and gives a remedy upon the bond. For

these reasons I am of opinion, that the plaintiff is entitled to the judgment of the Court.

HOLROYD, J. Upon the facts alleged in this declaration, I am of opinion that this action is maintainable upon the bond. I think that the deed endorsed on the bond operated not merely as a covenant to abide by an award, but as a variation of the condition of the bond; and that it must, from its import, be taken to have been so intended. Co. Litt. 237, shows that an obligation may be defeated by a defeasance made either at the time when the obligation is executed, or at any time after; and the passage cited from Sheppard's Touchstone is confirmatory of that doctrine, and goes further, to show that where several defeasances are made at different times, the last shall stand. The distinction is between things vested and a thing executory, as in a feoffment of lands. There, the estate is vested in the feoffee, and therefore a subsequent condition is void; but a bond is only executory, and may be defeated at any time by a deed, although not executed at the same time with the bond; and if there be two defeasances, the last is considered as a substitution for the first. And in Comyn's Digest, tit. *Defeasance*, (B 2,) it is laid down, that an obligation may be defeated by a defeasance, even after condition broken, as well as before. Now, in this case, the original defeasance was for the performance of an award to be made within a limited time; and the parties afterwards, but before the expiration of that time, by a subsequent defeasance under seal endorsed upon the bond, agreed to extend the time for making the award. If the latter instrument

*188] was intended to *operate not as an entirely new agreement, but only as a variation of the agreement contained in the condition, then the bond would become subject to a defeasance applicable to an award made within the extended time. For, as a defeasance may be made at a subsequent time, or one defeasance may be substituted for another in toto, it follows that where the term of a defeasance is altered in some particular respect by a subsequent instrument of as high a nature, the part so altered may be considered as a substitution for the corresponding part in the original defeasance. In this case, therefore, the extended time for making the award may be considered as a substitution for the time mentioned in the condition. If the parties, by the deed endorsed on the bond, had stated that the bond was to be void upon the performance of an award by the same arbitrators within the extended time, without referring to the former defeasance, according to the authorities the latter defeasance would have stood. It appears to me to have been the intention of the parties to substitute the one for the other, as clearly as if they had incorporated in the latter deed all the words of the condition. The case of *Brown v. Goodman* is distinguishable from the present, because there it did not appear that the consent to extend the time was by deed. Here, the alteration of the time was by deed; I am therefore of opinion that the plaintiff is entitled to the judgment of the Court.

BEST, J. I am of opinion that this action is maintainable upon the bond. The plaintiff's right to sue depends upon the penal part of the bond. She may declare upon that without setting out the defeasance. The effect of the defeasance is only to limit her right, and to

*189] *give a defence to the action, under certain circumstances. The new defeasance would give to the defendant a new defence, but does not alter the nature of the plaintiff's remedy, which would still be on the bond. The authorities referred to not only establish, that a defeasance may be made or altered, after the original deed is executed, so as to constitute a new agreement between the parties, but that the obligation continues the same, and may be sued upon, although the right to sue is controlled by the new defeasance. Moore, 573, is an authority to show that there may be a new defeasance, provided it be in writing; but the Court there did not think the nature of the plaintiff's remedy altered. So in 1 Rolle's Abr. 590, it is said, that if there be two defeasances, the first is void, and the second

only in force. If that be so, the second defeasance is a mere substitution for the first; but *Hodges v. Smith* is an authority expressly upon the very point. There the action was upon a bond for 200*l.*, and the defendant pleaded that after the obligation made, the plaintiff, by indenture, covenanted that if he paid 100*l.* at such a day, the obligation should be void, and then alleged that he paid on the day; the plaintiff demurred, on the ground that the indenture was made *after* the bond, and that the defendant, therefore, could only take advantage of it by way of covenant, and that it should not enure as a defeasance or a release: but all the Court held that it was well pleaded in bar. *Evans v. Thompson*, also, is an authority to show that all the terms of the original condition may be considered as virtually included in the deed endorsed upon the bond; and that therefore the latter may be considered as a new defeasance, the condition of which was to perform an award made within the extended time.

Judgment for the plaintiff.

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***The KING v. The Inhabitants of the Extra-parochial Hamlet of [190
KINGSMOOR.**

An indictment stated that a certain way was an ancient common highway, and that a certain part situate in an extra-parochial hamlet was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it: *Held*, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorably bound to repair; nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair.

Quære, Whether the inhabitants of the hamlet would be liable to repair at common law, if the indictment had contained the latter allegation?

THIS was an indictment preferred against the defendants at the quarter sessions for the county of Cumberland, for not repairing a road. The indictment charged the way in question to be an ancient king's highway, used for all the king's subjects; and that a certain part, situate in the *extra-parochial hamlet* of Kingsmoor, in the said county, therein described, was out of repair; and that the inhabitants of the extra-parochial hamlet of Kingsmoor the said common highway ought to repair and amend. The defendants were found guilty at the quarter sessions, and a writ of error was afterwards brought upon the judgment; and the error assigned was, that it did not appear by the indictment in what right, or for what cause, the inhabitants of the extra-parochial hamlet of Kingsmoor were bound to repair. The Court now called upon

Agliouby, in support of the judgment. It is for the public benefit that the roads of the kingdom should be kept in good repair, and the law has thrown that burden upon the inhabitants of certain known districts; the parish is, generally speaking, that district. Here the road is situate in an extra-parochial district, and upon principle the inhabitants of that district ought to be charged with the burden of repairing it. It is clear that the inhabitants of a parish are liable, not by particular custom, but of common right. *Rex v. *Sheffield*, 2 T. R. [191
106, and *Rex v. Penderryn*, 2 T. R. 513. But the common law obli-
gation must have existed before the ecclesiastical division of the kingdom into parishes took place. The civil divisions of the kingdom into counties, hundreds, and tithings, is more ancient, having taken place A. D. 890, and, according to some authorities, at a much earlier period; (a) whereas the ecclesiastical division was not completely effected till long after that time. 1 Bl. Comm. 112. Before the ecclesiastical division took place, the inhabitants of some known district must have been liable to the repair of the roads; and if any such district were not then included in the division of the kingdom into parishes, the liability to repair the roads, situate within it, remains as it was before. Now the road indicted is situate in a hamlet, or vill, not forming part of any parish, and therefore the inhabitants of such hamlet must be liable to repair of common right. The inhabitants of a vill were formerly liable at common law to the re-

(a) Note to Thomas' Edit. of Co. Lnt. 49; Burn's Ecc. Law, 1. 65.

pair of roads. 27 Liber Assisarum, 44, (21.) In Compton's Jurisdiction, 76 Lib. Ass. 63, is erroneously cited for this position. In 15 Car. 2 the inhabitants of the hundred of Yarton were indicted for not repairing a road; *Rex v. Yarton*, 1 Sid. 140; and there TWISDEN, J., stated that he had been counsel on a similar indictment for the vill of Camberwell. A parish is a mere precinct, within a diocese, and may comprehend several vills, or be part of a vill. Com. Dig. tit. *Parish*, (B 1.) A parish was not even recognised by common law; and when a place was mentioned generally, it was intended only to be a vill. *102] *Wilson v. Laws*, 2 Salk. 501; *Addison v. Sir John Otway*, 1 Mod. 250; Freeman's Rep. 228; Co. Litt. 125 b. [BAYLEY, J. Assuming a vill to be liable, still the hamlet indicted may, for any thing that appears upon this record, be one of two or more hamlets forming one entire vill; and although the larger district should be liable, yet the hamlet, if a division only of the vill, would resemble a township, a division of a parish, and the manner in which the liability was incurred, must be shown in an indictment against a township.] A township is a known portion or division of a larger district, which is recognised as liable by the common law to repair the highways within its limits; and therefore it is necessary that an indictment against the smaller division should show in what way it has taken upon itself a burden to the relief of the larger district, which was originally liable, and of which it forms a part. Besides, a hamlet and vill are synonymous. *Rex v. Morris*, 4 T. R. 550; *Rex v. Walbech*, 1 Bott. 88. A hamlet is, therefore, a division of the kingdom recognised by the law. A special custom may be alleged within it; Co. Litt. 110 b; and it is mentioned as a known district in the statute 27 H. 8, 25. The inhabitants of such division, if extra-parochial, must be liable to repair as of common right, both upon principle and authority; and if so, it cannot be necessary to allege immemorial usage to repair. The older authorities show that a vill is liable at common law, and therefore that it is not necessary to allege an immemorial liability. Nor can it be necessary to aver, that a hamlet is not part of a larger district, the inhabitants of which are bound to repair. For that is not to be intended, inasmuch as, generally speaking, the parish only is liable; and it appears upon the face *of the indictment that the road is situate in

*103] a hamlet which is not included in any parish. Therefore, *prima facie*, no persons are liable but those who were made defendants in this indictment.

Courtenay, contra, was stopped by the Court.

BAYLEY, J. It is the duty of a party preferring an indictment to show, on the face of it, an obligation in the party indicted to discharge the duty for the neglect of which the indictment is preferred. It must be shown that the party indicted is either liable of common right, or from some other special cause. The inhabitants of a parish are liable as of common right, and therefore, as against them, it is sufficient to allege that they ought to repair. But if it be sought to charge the inhabitants of part of a parish with the burden of repair, that being against common right, it must be shown on the face of the indictment how they are liable, whether by custom or prescription. *Rex v. Penderryn*. It is said, however, that the inhabitants of an extra-parochial hamlet are, in this respect in the same situation as the inhabitants of a parish, and are liable as of common right. I think we are not warranted, upon this indictment, in coming to that conclusion, nor are we called upon to decide whether the inhabitants of every known district were or were not bound by common law to repair the roads within it. In order to raise that question, it ought to have been shown on the face of the indictment, that the hamlet of Kingsmoor neither forms part of, nor is connected with, any other larger district, the inhabitants of which are

*104] liable to repair the road in question. That not being *stated, the general question is not raised. I am therefore of opinion that this indictment is bad, inasmuch as it does not show that the hamlet of Kingsmoor is not part of any larger district, upon the inhabitants of which the obligation to repair

may attach, or that the defendants are liable by immemorial custom or prescription. The judgment must therefore be reversed.

HOLROYD, J. I think this indictment is bad. Upon a plea of not guilty to an indictment not charging a special obligation to repair, the general obligation need not be proved. The plea puts in issue only the facts alleged, and not the legal liability. In a common indictment against a parish for not repairing a road, upon a plea of not guilty, it is not necessary for the prosecutors to prove that the parish is liable, because the common law throws that burden upon the parish. In order to put in issue the liability of the parish, the defendants by their plea must show a special obligation in some other body to repair. Here the only allegation of fact is, that an ancient highway, situate within the hamlet was out of repair. The obligation to repair is stated as a conclusion of law, resulting from the fact of the highway being within the hamlet; and it would not be necessary at the trial, upon the plea of not guilty, to prove any special obligation to repair. Now if this indictment be good, it would not have been a good defence to show that the hamlet was part of a larger district, the inhabitants of which were bound to repair the road in question. Assuming, therefore, that an extra-parochial place may be in this respect subject to the same liability as a parish; more should have been alleged on the face of the indictment to make the common law liability attach. All *the facts alleged in this indictment may be true, and yet the hamlet indicted may be part of a [195 larger district, in which there is a present obligation to repair.

BEST, J. It is not necessary to consider whether the civil division of the kingdom is more ancient than the ecclesiastical, inasmuch as it is clear that the latter took place before the time of legal memory, and it is indisputable that the common law has thrown the burden of repairing roads on parishes. If you proceed against any other district you must not only allege, that the inhabitants of such district are bound to repair, but you must show from what the obligation to repair arises, viz., that they were bound by custom or prescription. (a) The cases in which this has been decided have been, where it has been attempted to throw the whole burden of repairing roads on particular divisions of a parish, such as townships, instead of the entire parish. Those cases may be said not to apply to that which is now under consideration, because here there is no parish on which the charge can be thrown, the hamlet in which the road is situated being stated to be extra-parochial; but they are authorities which answer the argument, that the common law imposes the burden of repairing on districts included within the common law division, and not such as belong to the ecclesiastical division. I can find no authority for saying that any thing but a parish is to be charged. If the law authorizes no charge except on parishes, places that are extra-parochial are not, by the general rule of law, liable. But there will be no *difficulty in compelling the repair of [196 old roads in such places. These roads must have been repaired by somebody; and proof of such repairs under an indictment, properly charging them, will oblige the persons who have repaired them to continue to do so. A case in *Siderfin* has been referred to, which is so loosely reported that it is difficult to understand it; I, however, collect from that case that an indictment against the hundred for not repairing a road, was bad; but as the hundred had pleaded to it the Court would not quash it. This case cannot be considered as an authority in favour of the indictment before us, but rather against it. (b)

Judgment reversed.

(a) *Rex v. Morton*, Andrews, 276; *Rex v. Great Broughton*, 5 Burr. 2700.

(b) The same case is reported in Keble, 274, 498, 514, under the name of *Rex v. Inhabitants of Yarton*; the report of it there is but little more intelligible than that given in 1 Sid. But it is not stated there that the defendants were the inhabitants of a hundred; on the contrary, in p. 498, it appears that the issue was, "that the defendants ought not to repair," which was argued to be contrary to law, "the lands being laid to be in their own parish;" and in 514, it is said, that the proceeding was an issue tried by consent.

*197]

*The Earl of CARDIGAN v. ARMITAGE.

A. being seised in fee of the manor of F. and the demesne lands thereof, and of all the coal mines lying under the manor, enfeoffed C. D. of and in certain closes, except and always reserved to the feoffor, his heirs, and assigns, all tithes of corn and grain, and also except and always reserved out of the said feoffment unto the feoffor and his heirs, all the coals in all or any of the said lands and premises, together with free liberty for them, the said feoffor and his heirs, and his and their assigns and servants, at all times thereafter, *during the time that he, (the feoffor) and his heirs should continue owners and proprietors of the demesne lands of F., to sink and dig pits, or otherwise to sough and get coals in all and every the lands and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their free will and pleasure; he, the said feoffor, and his heirs, paying to the feoffee, his heirs, and assigns, such satisfaction for the damages as two neighbours, indifferently chosen by the feoffee and feoffor, their heirs, and assigns, should from time to time award.*

The heirs of the feoffor having for a valuable consideration conveyed to a purchaser in fee the manor of F. and its demesne lands, with its appurtenances, and all the coal mines under (amongst others) the lands in question, &c., it was held that the coals were, by the exception, reserved to the feoffor in fee, and therefore that they passed to the purchaser; and, also, that the latter was entitled, under the express liberty reserved, to enter upon the land, to dig pits and get the coals, so long as he remained owner of the demesne lands.

Seem. That the express liberty is not restrictive of that which would be implied by law to get the coals, and that the purchaser would be entitled to an incidental right to get them coextensive with his estate.

TRESPASS for breaking and entering three closes of the plaintiff, and digging pits and raising coal. Pleas, first, as to all the trespasses, that the said several closes from time whereof, &c., had been parcel of the manor of Farnley, and that Sir Thomas Danby was seised of the said manor and the demesne lands thereof, with the appurtenances, and all coal mines, &c., lying under the said manor, in fee; and that he, on the 16th January, 1649, enfeoffed the then Earl of Sussex of, among other premises, the said three several closes in the declaration mentioned, (except and always reserved unto the said Sir Thomas, his heirs, and assigns, all tithes of corn and grain arising, happening, coming, or accruing within the said several messuages and farms aforesaid, and within every and any part or parcel thereof, and also except and always reserved out of the said feoffment unto the said Sir Thomas and his heirs all the coals in

*198] all or any of the said lands, woods, grounds, and *premises, *together with free liberty for them, the said Sir Thomas and his heirs, and his and their assigns and servants, from time to time, and at all times thereafter during the time that the said Sir Thomas and his heirs should continue owners and proprietors of the demesne lands of Farnley, to sink and dig pits, or otherwise to sough and get coals in all and every the said lands, woods, grounds, and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their wills and pleasures; he the said Sir T. Danby and his heirs, from time to time, giving and paying unto the said Earl, his heirs, and assigns, such sufficient satisfaction for all such damages as he the said Earl and his heirs should from time to time sustain by reason of the digging, sinking of pits, soughing, getting, and carrying away the said coals, in all or any of the said lands, woods, grounds, and premises, as two gentlemen, neighbours thereunto, being indifferently chosen by the said Earl and the said Sir Thomas, their heirs, and assigns, should from time to time order, award, and think fit to be given and paid;)* to hold the said premises unto the Earl, his heirs, and assigns, for ever. By virtue of which said feoffment the said Earl became seised of the said last-mentioned premises, and, amongst other lands, of the said several closes, in which, &c., in his demesne as of fee, the said Sir Thomas continuing owner and proprietor, and seised of and in the demesne lands of the manor of Farnley, and entitled to the coals in all or any of the same premises so aliened as aforesaid, together with such liberty as thereinbefore mentioned. The plea then mentioned the death of Sir Thomas Danby on the 8th August, 1660, and that the manor and the

demesne *lands, with the appurtenances, after several mesne descents, (which were particularly set forth,) vested in one W. Danby, who, by [*199 lease and release, A. D. 1800, in consideration of a certain sum of money, conveyed the manor and lordship of Farnley and its demesne lands, with its rights, members, and appurtenances, and all the coal mines in or under, amongst other lands, the said three several closes in which, &c., to James Armitage in fee; who thereby became seised in fee of the manor, and owner and proprietor of the demesne lands, and entitled to the coals so excepted as aforesaid, together with the liberty thereinbefore mentioned. The plea then stated that James Armitage died intestate, and that the defendant, as his eldest son and heir at law, became seised in fee of the manor, and owner and proprietor of the demesne lands, and entitled to the coals, &c., together with free liberty for him and his servants to sink and dig pits, or otherwise to sough and get coals and culm in the said closes in which, &c., and to sell and carry away the same at his free will and pleasure, paying unto the plaintiff such sufficient satisfaction for damage, &c., as two gentlemen, neighbours, indifferently chosen, should award. The plea then justified the breaking and entering the said several closes in which, &c., for the purpose of sinking and digging pits, &c.; and averred that the defendant was willing to make such satisfaction for the damage sustained by reason of the supposed trespasses, as two gentlemen, &c., indifferently chosen, should award. The second plea only justified the breaking and entering the closes, because the plaintiff had wrongfully dug and got large quantities of coal lying under the said several closes in which, &c., and had deposited the same upon the said closes, wherefore defendant entered to take them away. To these *pleas there was a general demurrer and joinder. [*200 The case was argued at the sittings after last Easter term.

Tindal, for the plaintiff. There are two questions raised upon these pleadings; first, whether the defendant has the right to enter and dig pits to get and take the coals. And, secondly, whether the defendant has the right to the coals themselves if he can get them without digging pits. As to the first point, the defendant has no right, under the express liberty reserved by the deed, to enter and dig pits, because it appears by the plea, that the heirs of Sir Thomas Danby have ceased to be owners and proprietors of the demesne lands of Farnley, and the liberty of entering to dig pits is limited expressly to the time during which the feoffor and his heirs should continue owners of the demesne lands. The right to enter, therefore, became extinguished when the heir of Sir Thomas Danby ceased to be owner of the demesne lands. In order to make it continue longer, it must be contended that the reservation has the same meaning as if the word *assigns* were inserted in it, but the word *heirs* does not necessarily include assigns. It is true, that if there be a gift of land to a man and his heirs, this enables him to give it to his assigns; that, however, is not because assigns are included in the word *heirs*, but because the donee takes a fee-simple, and the power of alienation is incident to that estate. Before the statute quia emptores, the word *assigns* was necessary to enable the party to alien although he had the fee. *Horne's Mirror*, p. 11. It is clear, that the parties did not intend in this part of the exception to include *assigns* under the word *heirs*; for in the first part of the exception all tithes of corn are reserved *to the feoffor, [*201 his heirs, and *assigns*, but the reservation of the coals is to the feoffor and his heirs only. It is true, that if there were a general exception of the coal to the feoffor and his heirs, the law would imply a right to get it coextensive with the reservation; but here, an express liberty is given to get the coal only so long as the feoffor's heirs continue owners of the demesne lands, and then the maxim applies, *expressum facit cessare tacitum*. The parties, therefore, have expressly limited the duration of the privilege, and it ought not to be enlarged by implication, unless the limitation be contrary to law. When the purchase was made, the parties may have contemplated the ceasing of the dis

turbance occasioned by getting the coal; and the deed shows that they did so, for although the coal itself is reserved in fee, the privilege of getting it is reserved for a limited time. And such a reservation is not against law, for it is not necessarily a restriction of a previous grant, as the coal may be got without making pits in the land. And even if the coal could not be dug at all, there would not be any thing illegal in such a bargain. [BAYLEY, J. Your argument must go the length of saying, that the deed gave a freehold in the coals in futuro.] That objection would certainly apply, if part of the thing granted had been reserved; for then, as it would not pass by the livery, it would not pass at all, and the grant, as to that, would be void. But that rule is limited to things in existence at the time of the grant. Here, the privilege of entering to get coals was no part of the thing granted. It was not then in existence. A new incorporeal hereditament was then created, viz., a right to enter upon the land and to get the coals. The deed, therefore, operates as a regrant of the exclusive right of digging coals, vesting in the grantor in fee, and *determinable on his ceasing to be owner of the demesne lands. [HOLROYD, J. You consider the right of entry as a grant, but if the coal by itself had been excepted without more, that would have given a right of entry for ever. You must therefore contend, that the subsequent exception of the liberty operates to extinguish what had been before given by law.] Here, the parties have expressly substituted a limited right of entry for that which the law would otherwise have granted, and *modus et conventio vincunt legem*. This does not operate as a grant of a freehold in the coals in futuro to the feoffee and his heirs, but as a grant of a new privilege to the feoffor and his heirs for a limited time; and then, like a rent-charge granted to A. and the heirs of his body, when A. ceases to have heirs of his body, it falls into the estate. As to the second point, the exception of the coal is as much limited as the liberty to get it, and it operates not as a reservation of a fee-simple absolute in the coal, but as a reservation of it so long only as the grantor and his heirs should remain owners of the demesne lands of Farnley; or in other words, as a reservation of a fee-simple in the coal, qualified as to the time of its duration. A grant to a man and his heirs, tenants of the manor of Dale, Co. Litt. 27 b; or so long as John a Downe has issue of his body, 7 Ed. 4, 12; or so long as such a tree shall stand, 27 H. 8, 29, pl. 20; or so long as I. S. has heirs of his body; or so long as Bow Church stands; or as long as J. S. lives, *Idle v. Cooke*, 2 Ld. Raym. 1148, are all instances of qualified or base fees. In such cases, though the estate descends to a man's heirs, yet they have it for no longer time than is contained in the respective limitations. It is *true that the limitation in

*203] this case taken, according to the strictest rules of grammar, applies only to the liberty of sinking pits; but taking the whole clause together, it appears clearly to have been the intention of the parties to make the two rights coextensive. Why should the feoffor reserve the coals for a longer period than the right to get them. It cannot be supposed that he intended to reserve a right to the coals in fee, and a right to get them so long only as the ownership of the demesne lands was in him and his heirs. The whole ought to be construed as one reservation to him and his heirs, to have and get the coals during the time they should remain owners of the demesne land; and if so, the feoffor only reserved a qualified fee in the coals determinable upon his heirs ceasing to be owners of the demesne land; and that event having happened, the estate of the feoffor is determined, and the defendant has no right to the coals.

Littledale, *contra*. The clause in question operates as a reservation of the right of working and digging the coals to Sir Thomas Danby, in fee. It must be construed as if it was a grant; and then it is quite clear, that it would not be necessary to have the word "assigns," in order to give an absolute fee. The first part of the clause operates as a reservation in fee of a right to the coals, and the restrictive part (which is no part of the grant) reserving the

liberty to get them so long as Sir Thomas Danby and his heirs should remain owners, is void. In *Corbet's case*, 2 Anderson, 138, the 11 Assize, p. 8. is cited, to show, that if land be given to one and his heirs, so long as J. S. or his heirs should enjoy the manor of D., *these words, "so long as," are [204] vain and idle, and do not abridge the estate. In *Hornby's case*, 1 Anderson, 52, the lessor having leased to Clifton for twenty-one years, certain premises, except and reserving to the lessor for his own sole use and occupation two chambers, &c., parcel of the messuage, it was held that the exception was absolute, and the words "for his own use and occupation" were vain and void words. It is true, that a different decision of that case is reported in Dyer, 264; but the report of the same case in New Bendloe, 181, agrees with that in Anderson; and the ground of the decision is stated to be, that the latter words were void, because the things excepted were not demised. The report of the case by Anderson was considered correct in the case of *Cudlip v. Rundall*, 1 Show. 288; 4 Mod. 9. In the latter case the lease was of certain premises, excepting a certain house called the New-house, lately built, for the father of the lessor and himself, and their wives and families, *but not to be let to any other person whatever*; and when they did not dwell there, to be used by Rundall; and Holt, C. J., considered this as an absolute exception, not qualified by the subsequent words. These authorities show that the exception operates as a reservation of a fee-simple absolute in the coals; and that being so, the law will imply a liberty to get them coextensive with the estate reserved. And in that case the express liberty will not be nugatory; for at common law the party would have been entitled only to do what was necessary to get the coals, but, by the express liberty, the party may sell them, or carry them away in carts, or otherwise dispose of them at his will and pleasure. Now, an express liberty which goes beyond that which *the law will imply, does [205] not control the implied liberty. *Stukeley v. Butler*, Hobart, 168, is a strong authority in point. Besides, the effect of an exception is, to take that which is excepted out of the conveyance; and that being so, the right of getting the coals remains, as it was before the feoffment, in Sir Thomas Danby, in fee. Assuming, however, that the express liberty has the effect of controlling that which would otherwise exist, the defendant is within the meaning of the express liberty, for he is the owner of the coals, and also owner of the demesne lands; and construing the deed liberally, the liberty may be considered as reserved to any person being owner of the demesne lands, and of the coal, whether by descent or purchase. It must be wholly immaterial whether the party so exercising the liberty claims by descent or purchase.

Tindal, in reply. The authorities referred to in *Corbet's case* are not to be found; and the only conclusion to be drawn from that case is, that a condition against alienation after a fee given is void, and that is not disputed. Here, the right to the coal and of digging pits for the purpose of getting the coal, was reserved, so long only as the heirs of Sir T. D. remain owners of the demesne lands. It has determined by the event which has happened, and the defendant, therefore, was a trespasser.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the Court; and, after stating the pleadings, proceeded as follows.

*The first plea raises two questions; one, whether Mr. Armitage is [206] entitled to the coals under the closes in question, he not claiming by descent under Sir Thomas Danby; but by purchase; and the other, whether, for the purposes of getting them, he is entitled to use the means stated in the first plea. The second plea raises the former of these two questions only. Both questions depend upon the effect of the exception set out in the plea; and the plaintiff contends, that that exception gave nothing beyond a limited right to continue, so long only as Sir Thomas Danby and his heirs should continue owners of the Farnley demesnes; and the defendant, that it either gave an absolute and per

petnal right in fee-simple to the coals, or at least that it gave the special liberty, so long as the owner of the coals should also be owner of the Farnley demesnes. The counsel for the plaintiff, if I understood him right, disclaimed all formal exceptions to the pleas, and stated the object to be, to ascertain whether Mr. Armitage had a right to the coals, and if he had, whether he had also a right to get them; and to these questions, without considering whether there are any formal objections to the pleas, my observations will be directed. The exception in question contains the words "except and always reserved;" and Co. Litt. 47 a, points out the distinction between an exception and a reservation. The former, an exception, he says, is ever of part of the thing granted, (and so says Sheppard's Touchstone, 78,) and of a thing in esse. The latter, a reservation, is always of a thing not in esse, but newly created and reserved out of the thing granted: "potest enim quis rem dare, et partem rei, vel partem de pertinentiis retinere et illa pars quam retinet semper cum eo est et semper *207] fuit." Another rule as to exceptions is *to be found in Sheppard's Touchstone, 100. "The exception is always taken most in favour of the feoffee and lessee, &c., and against the feoffor, lessor, &c. And yet it is a rule, that what will pass by words in a grant, will be excepted by the same or the like words in an exception. And it is another true rule, that when any thing is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chapman to view them, if he desire to sell them, and he or the vendee may cut them and take them away." And the same rule applies to grants. Plowd. 15, 16; Vin. Abr., *Tres.*, (Ma;) *Hodgson v. Field*, 7 East, 613; *Gerrard v. Cooke*, 2 New Rep. 109. The language of this feoffment is, "except and always reserved" out of the said feoffment unto Sir Thomas Danby and his heirs al the coals. The coals were part of the thing granted, part of the land, and in esse at the time. The consequence, therefore, according to Co. Litt. is, that if this, which in words was an exception, operated in point of law as an exception, the coals semper cum Sir T. D. fuerunt. They were never out of him, and without the words of inheritance, "and his heirs," would have remained as before in Sir Thomas Danby and his heirs. Shepp. Touch. 100. And according to the rule I have last mentioned, from Sheppard's Touchstone, a right, as incident, to get the coals, and to do all things necessary for the obtaining of them, would have been excepted also. It was, indeed, conceded in the argument, that if the exception had stopped after excepting and reserving the *208] coals to Sir Thomas and his heirs, and *had contained no words to give him an express liberty for sinking pits and doing other works to get them, the exception would have enured, without any restriction, to Sir Thomas in fee; and that he, his heirs, and assigns, would have had a right *for ever*, to do what should be necessary to get the coals; but it is upon the ground, that the express liberty is limited, and restrictive of the former exception, that the plaintiff makes his claim. The question therefore is, whether the express liberty restrains the former exception, and if it do, to what extent it restrains it. One objection which occurs is this, the pleas purport to set out the feoffment according to its legal operation; that operation is stated to be, that Sir Thomas D. excepted the coals to him and his heirs. Is it open to the plaintiff upon his demurrer, to contend that this was not the operation of the exception? Is there any instance in which a party has been allowed, upon demurrer, without setting out the instrument at large, or traversing the operation ascribed to it, to raise the question, whether the deed has the operation ascribed to it upon the pleadings? I know none; and I mention this, because if it be intended to carry this case to a court of error, it is desirable that the plaintiff should consider whether the case is at present as advantageously set out as it might. But independently of this point, and assuming that the exception, as stated upon the pleas, is in the very words stated upon the feoffment, how stands the

case? The express liberty is introduced by the words "together with," as if the intention were to increase what had preceded, not to diminish; and I take it to be a general rule, that words tending to enlarge shall not (unless the intention is very plain,) be taken to restrain. *Winter v. *Love-* [209]
den, Lord Raymond, 267. The express liberty here, is, for Sir Thomas and his heirs, and his and their assigns and servants, *during the time that he and his heirs should continue owners of the demesne lands of Farnley, to sink pits, to sough and get the coals, and sell and carry away the coals, or otherwise to dispose of them at their wills and pleasures; Sir Thomas and his heirs making such satisfaction to the earl, his heirs, and assigns, as two gentlemen neighbours, to be indifferently chosen by them, their heirs, and assigns, should award.* It may be taken as clear, that an express liberty does not always control what would otherwise exist, especially if the express liberty goes beyond what would be implied. To give it a controlling power, the intention that it should have that effect must be very plain. *Stukeley v. Butler, Hobart, 168* is a strong authority upon this point. In that case the Earl of Sussex, as lord of the manor of Cleave, had demised certain woodlands of that manor for three lives, (excepting all timber trees,) and then he bargained and sold to one George, all the trees growing in and upon his manor of Cleave; and he covenanted, that George and his assigns, *during five years*, might sell and carry the trees without interruption of the earl or any others, and might make saw-pits, and square and cut the timber upon the ground during the said term; and George covenanted to fill up the pits and make all things fair, and amend the fences that should be broken during the said term. The grant to George was general, not fixing any limit within which he was to cut the trees: he did not cut them till after five years from the time of the bargain and sale; and an action of trespass being then brought, *one question upon a special verdict was, whether the covenant on Lord Sussex's part, that George [210] might take the trees within the five years, should so check and control the grant that he might not take the trees after the five years; and Lord HOBART, who reports his own opinion, held clearly that it did not, but that as the trees were absolutely given, George and his assigns might take them when they would. And his opinion is founded upon two reasons which are strongly applicable to the present case. First, he says it is clear, that by the grant of the trees by tenant in fee-simple, they are absolutely passed from the grantor and his heirs, and vested in the grantee, and go to his executors or administrators; and the grantee hath power incident and implied to fell them, when he will, without any other license, which (*i. e.* the power incident and implied) can never be restrained by a power given by the grantor in the affirmative, which grantee had before. He then cites 8 Ass. 10, and Dy. 19; and refers to the known rule, that statutes that are taken by intent, shall not by an affirmative take away a former power. The case in 8 Ass. 10 was strong. Ten marks of rent were granted to husband and wife; and if she survived, she was to have 40s. rent; and if the husband survived, he was to have 40s. rent. The wife survived; and if she should have the ten marks or the 40s. was the question. And upon adjournment from the assizes into bank, it was held she should have the ten marks; because the words, that she and her husband should have ten marks, were not restrained by the subsequent words, that she should have 40s., it not being said that she should have the 40s. and no more. In Dy. 19 b, lessor covenanted that lessee should have thorns for *hedges growing on the land, [211] by assignment of lessor's bailiff; and whether the lessee might take the thorns without such assignment, was the question. And it seemed to Baldwin and Fitzherbert that he might, because the law gave him the right by implication in the lease. Lord HOBART's second reason is this, that the covenant on the earl's part had its necessary use, though it worked nothing in the restraint of the time for felling: for it gives power to dig and make saw-pits, and square

the timbers there, which the grantee could not have done without such special warrant. And it contained a general warranty, that the grantee might take the timber without the interruption of any person or persons whatsoever. Apply both these reasons to the case in question: first, the exception here is by tenant in fee, to himself and his heirs; it therefore retains the coals in him and his heirs in fee-simple, with power incident and implied (as they are absolutely excepted) for him, his heirs, and assigns, to take them away when they will: *and this power cannot be restrained by a special power given in the affirmative.* As to the second, the special power here also hath its necessary use, for it goes beyond the incidental power which the law would imply. The incidental power would warrant nothing beyond what was strictly necessary for the convenient working of the coals; it would allow no use of the surface, no deposit upon it to a greater extent or for a longer duration than should be necessary, no attendance upon the land of unnecessary persons. It would be questionable at least, whether it would authorize a deposit upon the land for the purposes of sale, and whether it would justify the introduction of purchasers to view the coals. The express power gives great latitude in these respects. It

*212] "authorizes Sir Thomas and his heirs, at their will and pleasure, to dig pits and sough, to sell and carry away, or otherwise to dispose of. It removes the question, upon the making a new pit or sough, whether such pit or sough was necessary: it allows the selling and carrying away, or otherwise disposing of; and consequently warrants a deposit and continuance upon the land for the purposes of sale, and authorizes the introduction of customers for the purposes of sale. It has, therefore, its necessary use, in the language of Lord Hobart, though it work nothing in restraint of the incidental right which Sir T. D. and his heirs would otherwise have had. This case, therefore, is, as it seems to me, a strong authority against the point for which the plaintiff contends, the narrowing and restraining the general exception by the words of the express power; and the case of *Hodgson v. Field*, 7 East, 613, is also a strong authority to the same effect. There, liberty was granted to carry a sough to a colliery, and to make two sough pits in given parts to carry up the tail of the sough: those pits were accordingly made; and after some time a new pit being necessary to repair the sough, the grantee made it, and trespass was brought against him. It was urged for the plaintiff on demurrer, that the special privilege of making the two pits in the places specified superseded the right to make any other pits: but the Court held clearly that it had no such effect; that the right of repairing was incident to the grant; and that as it was not specially restrained, the grantee was entitled to do whatever was necessary for such repairs; and the pit in question being necessary, the defendant was warranted in

*213] making it. "But whether the express liberty in this case has or has not restrained the incidental right, we are of opinion, that upon the true construction of the deed, even if we are at liberty to assume that the plea stated its very words, the express liberty is still a subsisting liberty; and that, under that liberty, the first justification may well be supported. It cannot be collected from the feoffment that it was the intention of the parties to limit and restrain the liberty to the period that the Farnley demesnes should continue in the heirs of Sir Thomas in a course of descent. To restrain what is *prima facie* unlimited, the words should be plain and the intention clear. The limitation in the express power in this case is, during the time that Sir Thomas D. and his heirs should continue owners and proprietors of the demesne lands of Farnley; and the question immediately occurs, what is meant by the expression "Sir Thomas D. and his heirs?" If these words are used in the most restrictive sense, the liberty would end the moment the demesnes were diverted from a course of descent; and what the law generally leans against, viz., a restraint upon alienation, would, without any very clear motive, be encouraged. The moment a settlement or a devise was made, the course of descent would be broken, and

the liberty would cease. Can any rational ground be suggested for such a provision? If the object were to secure the working out the mines within some reasonable time, why not specify the period? why leave its continuance to an event which might not happen for many generations, or might occur within the shortest space? why put so capricious a check upon the ordinary arrangements applicable to estates? If the word "heirs" is used in this sentence in its ordinary extensive sense, "and in the sense in which it would *primâ facie* [*214 be taken in the exception, to Sir Thomas and his heirs, it would include assigns as well as heirs; the express power would continue so long as the coals and the demesnes belonged to the same person, whether by descent from Sir Thomas or by purchase, and would therefore still be a subsisting power; and it is in this sense, we are of opinion, the words were intended to be used. The stress laid in the argument upon the insertion of the word "assigns" in some parts of this feoffment, and the omission of it in others (assuming that the pleas state the very words of the feoffment) appears to us to furnish no solid or safe ground to regulate our decision. It is inserted in the exception as to the tithes; but it is uselessly inserted there. Without that word the exception would have enured, not merely to Sir Thomas and his heirs, but to his and their assigns. It is omitted in the exception, as to the coal: it was unnecessary there; and why may not the framer of the deed have credit for knowing that it was useless? Is it a safe rule of construction to say that the introduction of an useless word in one clause and the omission of it in another will justify the putting different constructions upon the two clauses? Because an useless word is inserted in one clause, is it necessary to insert it in every other which is intended to have the same effect? There are, however, other parts of this feoffment, which show how unsafe it would be to act in this case upon the omission or insertion of the word "assigns." The liberty of working is to extend to Sir Thomas, *and his heirs, and his and their assigns and servants*, and compensation is to be made for the damage to be done; but though the damage may be done by the *assignee* of Sir Thomas, or of his heirs, there is no provision *in terms* for satisfaction *by such *assignee*, but the satisfaction is, according to the words of the feoffment, to be by Sir Thomas [*215 and his heirs. Again, satisfaction is to be paid to the earl, his heirs, and *assigns*, but for what damages? for such damages as he and *his heirs* should sustain. So that if the earl were to alien in fee, and his alienee were to sustain damage, there would be no words, were the letter to be adhered to, to give him satisfaction, because the damages would not be sustained by the earl or his heirs. This is sufficient to show that no safe reliance can be placed upon the insertion or omission of the word "assigns," and furnishes ground for supposing that the word "heirs" is used in its larger sense, so as to include assigns. Upon the whole, therefore, we are of opinion, that the defendant, Mr. Armitage, is entitled to the coals: and if he is not entitled to the incidental right of getting them, we think that he is still entitled to the liberty expressly reserved by the feoffment, because the defendant, to whom the coals belong, is also owner of the demesnes; and though they have not come to him by descent from Sir Thomas, we are of opinion that the liberty is not confined to those who take by descent, but enures also to those who take by purchase. The consequence is, that upon both the pleas there must be judgment for the defendant.

Judgment for defendant.

See in 2 Cruise's Dig. tit. xiii. c. 2, s. 6, 7, 8, the cases where persons, having an interest in a condition, or in the land to which it relates, may perform the condition, although not named in it.

216] Earl of St. GERMAINS v. WILLAN and Another, Executors of J WILLAN.

Plaintiff demised by indenture to B. (defendants' testator,) certain premises to hold for eleven years from the 29th of September, 1809. B. covenanted, amongst other things, that he would not, *during the lease*, sell or convey away from the premises any of the straw which, during the *leased term*, should grow upon the premises, (except wheat-straw and rye-straw); and that for every load of hay, wheat-straw, and rye-straw, which should be sold or removed off from the premises during the *thereby leased term*, he (B.) would bring back a cartload of dung; and plaintiff covenanted that it should be lawful for B. to have the use of the barns, &c., for receiving his crops of corn and hay which should grow upon the premises in the last year before the end of the term thereby granted, and for certain other purposes, until the 1st day of May next after the expiration of the said term, without paying any rent for the same. The fourth breach assigned was, that B., *during the said leased term, to wit, on September 30th, 1820, and on divers other days between that day and May 1st, 1821*, did remove off from the premises large quantities of hay, wheat-straw, and rye-straw, without bringing back a cartload of dung for each load of hay and straw. Plea to so much of that breach as related to removing hay, &c., *during the said leased term*, that B. did bring back a load of dung for each load of hay, &c., removed; and demurrer to the residue of that breach. Joinder in demurrer. Defendants also pleaded to all the breaches, except the fourth; and to so much of that as related to removing hay, &c., *during the said leased term*, a release of all causes of action, except such as plaintiff had in respect of B. not bringing back to the premises manure for the hay, &c., removed after the 29th of September, 1820. Demurrer and joinder: *Held*, that the plea to the fourth breach answered the whole of that breach, and that therefore the demurrer to the residue was bad: *Held* also, that the *leased term* continued for certain purposes until the 1st of May, 1821; so that the release did not extend to all acts of removal done during the *leased term*; and therefore the plea of release did not answer so much of the fourth breach as it affected to answer, and being bad in part was bad in toto.

COVENANT on an indenture, whereby the plaintiff demised to J. Willan (the testator) certain premises, to hold from the 29th of September, 1809, for eleven years thence next ensuing; and J. W. covenanted that he would not, *during the lease*, sell or convey away from the premises any of the straw, which, during the *thereby leased term*, should grow upon the premises, except wheat-straw and rye-straw, or sell or convey away any of the dung, which, during the *thereby leased term*, should arise from the said premises, except the dung, &c., made of the straw, &c., grown in the last year before the expiration of the term thereby leased, which he, J. W., would leave in the yards belonging to the farm-houses, on or before the first day of May in such last year, for the *possession of the premises; and that, for every load of hay, wheat-straw, and rye-straw, which should be sold or removed off from the premises during the *thereby leased term*, he, J. W., should and would bring to the premises one large cartload of rotten dung, or other good and proper manure, and spread the same in an husbandlike manner. And the plaintiff covenanted, that it should be lawful for the testator to have the use of the barns, &c., for the receiving of his crops of corn, grain, and hay, which should grow upon the premises in the last year before the end, expiration, or sooner determination of the term thereby granted, and for thrashing out the said crops of corn and grain, and for spending of the straw, hay, and stover which should arise therefrom, with cattle, (wheat-straw and rye-straw excepted,) until the first day of May next after the expiration of the said term, without paying any rent for the same; he, the said testator, leaving all the muck, &c. arising from such corn, grain, and hay, for the use of the persons entitled to have the premises immediately expectant on the determination of the said lease. Breaches: First, that the testator *during the said lease*, and before the 1st day of May, 1821, to wit, on the 30th of September, 1820, and on divers days between that day and May 1st, 1821, did sell and convey away from the premises a large quantity of straw, not being wheat-straw, or rye-straw, which grew upon the farm. Secondly, that J. W., *during the said lease*, to wit, on, &c., (as before) did sell and convey away a large quantity of dung, which arose and was made on the said leased premises. Thirdly, that a large quantity of dung, &c., was made in the last year before the expiration of the

term leased by the said indenture; but that J. W. did not leave it in the yards belonging to the farm-house, for the use of the persons next entitled to the possession of the premises. Fourthly, that J. W. did, during the said leased term, to wit, on September 30th, 1820, and on divers other days between that day and May 1st, 1821, remove off from the premises large quantities, to wit, ten thousand loads of hay, ten thousand loads of wheat-straw, and ten thousand loads of rye-straw, which had grown on the premises during the term, yet did not bring back a large cartload of rotten dung for each load of hay and straw. Fifthly, that although J. W. had the use of the barns, &c., until May 1st, next after the expiration of the said term; and although a great quantity of oat-straw, pea-straw, hay, and clover, did grow and arise upon the premises, from which a great quantity of dung was made, yet he did not leave the same upon the premises for the use of the person entitled to them immediately on the determination of the said lease. Pleas to the first and second breach, denying that J. W. did the acts alleged; to third breach, that he did leave the dung in the farm-yards, for the use of the person entitled, as in the indenture mentioned; Fourth plea, to so much of the fourth breach as relates to the removing off, by J. W., during the said leased term, from the said premises, the said quantities of hay, &c., in that breach mentioned, which had grown on the said premises, during the said term, that J. W. did bring to the said premises one large cartload of rotten dung, for every load of hay, &c., so removed, during the said leased term; and demurrer to the residue of that breach. Fifth plea, as to last breach, that J. W. did leave the quantities of dung, &c., therein mentioned, for the person next entitled to the premises, according to the indenture. Sixth plea, to first, second, third, fifth, and that part of fourth breach which relates to the removing of hay, &c., during the said leased term, a release of all causes of action, claims, &c., except such claim as plaintiff had in respect of J. W. not bringing back to the premises dung and manure for the hay, &c., removed after the 29th day of September, 1820. Replication, taking issue on the first five pleas; joinder in demurrer to the fourth breach, and general demurrer to sixth plea. Joinder in demurrer to that plea.

F. Pollock, for the defendants. Their lease is a sufficient answer to the first, second, third, and fifth breaches. The only question is, whether it be an answer to that part of the fourth breach to which it is pleaded. [BAYLEY, J. If it is not an answer to that, it is bad as to all.] The breaches are in their nature several; and the plea of release may be considered as a separate plea to each respectively, although it is not set out several times over. The fourth breach is, for not bringing back a load of manure for every load of hay, wheat-straw, and rye-straw, carried off the farm during the leased term. Now the lease contemplated the ending of the term on the 29th of September, 1820, and merely gave a license to use the premises subsequently to that date. There was no engagement to spend wheat-straw and rye-straw on the farm; that, therefore, might be carried away: and there was no obligation to bring back manure for that which was carried away after the expiration of the term. The sixth plea is therefore good; and on the demurrer to part of the fourth breach, the defendants are also entitled to judgment. The words *leased term*, in that breach, being under a videlicet, would not confine the proof to the 29th of September, 1820; but the plaintiff has no right of action for that which his breach charges, if done after that time. The defendants, therefore, could not take issue upon the whole of the breach, but were obliged to demur to that part of it which would have let in evidence of acts done after the expiration of the term granted by the lease.

RAYLEY, J. It is a well-known rule of pleading, that if a plea does not answer all that it professes to answer, it is altogether bad. If then this plea of release is insufficient as to one breach, it is bad as to all. Now the term granted by the lease was, for certain purposes, to continue until the 1st of May, 1821,

although for others it terminated on the 29th of September, 1820. That a term may be so extended is clear from the cases of *Wigglesworth v. Dallison*, 1 Doug. 201, and *Beavan v. Delahay*, 1 H. Bl. 5. If the owner of land consents by deed that another person shall occupy the land for a certain time, that is a lease. The true construction of this instrument is, that the term was not to end, for every purpose, until the 1st of May, 1821. The release is not then an answer to all demands in the fourth breach, for acts done *during the leased term*; for it is expressly limited to such acts as were done before the 29th of September, 1820. The sixth plea is therefore bad in toto, as it does not answer the whole of that to which it is pleaded. Then as to the defendants' demurrer, the plea to the fourth breach covered the whole time as to which evidence could be given. If the term ended on the 29th of September, 1820, the plaintiff's right could not be extended by an allegation that certain things were done after that time. The plea is, to all acts done during the *leased term*; that embraces the whole term, whatever it might be. As that plea answered the whole breach, the demurrer to the residue cannot be good. The defendant's demurrer must, for these reasons, be overruled, and the plaintiff's allowed.

HOLROYD, J. The *leased term*, for some purposes, continued until the 1st of May, 1821, although for others it ended in September, 1820. The whole of the fourth breach was, therefore answered, by the first plea to it, whether the term was extended or not. The defendant's demurrer is, consequently, bad. As to the other point, I think that the plea of release is not an answer to that part of the fourth breach which it professes to answer. A vast variety of cases show, that a plea not answering the whole that it professes to answer is bad in toto, whether it be pleaded to various facts in one count, or to various counts, or as a ground of defence for various persons.

BEST, J., concurred.

Judgment for the plaintiff on the demurrer to the sixth plea;
and defendant's demurrer to fourth breach overruled. (a)

Chitty was to have argued for the plaintiff.

(a) See 1 Wms. Saund. 27, n. (2); *Moravia v. Sloper*, Willes, 30; *Morse v. James*, Willes, 122.

*222] *The KING v. The Inhabitants of BAWBERGH.

The statute 56 G. 3, c. 139, s. 1, requiring that the order of justices for the binding out of parish apprentices shall be referred to in the indenture by the date thereof, is compulsory; and therefore an indenture, in which the date or the order is omitted, is void, and no settlement is gained by serving under it.

Upon an appeal against an order of justices for the removal of W. Pease from the parish of St. Andrew, in the city of Norwich, to the parish of Bawbergh, in the county of Norfolk, the sessions confirmed the order, subject to the opinion of this Court, on the following case. W. Pease was an illegitimate child, born in Great Melton, in Norfolk; and by an order of two justices, bearing date the 12th day of May, 1819, and made under the provisions of stat. 56 G. 3, c. 139, and an indenture, not stamped, was bound as apprentice. The order of justices was set out at length; and the indenture of apprenticeship stated, that the churchwardens and overseers, by and with the consent of two justices for the county of Norfolk, whose names were thereunto subscribed, bound W. Pease, a poor child, as an apprentice, for the term of seven years, &c.; but the indenture did not mention the date of the order of justices, nor did it appear whether they signed the indenture before or after the other parties. The parish officers of Melton paid the master the sum of 10*l.*, (which was the premium stipulated to be paid, by the indenture) and the pauper entered upon his apprenticeship, and served his master at Bawbergh for about a year and a half; when, on his master's failure, he left him and came to Norwich.

Marryat, in support of the order of sessions. The first section of the 56 G. 4, c. 139, enacts, that the *order of justices shall be delivered to the overseer, as the warrant for binding the child apprentice; and that such order shall be referred to in the indenture by the date thereof; and that after such order shall have been made, the justices shall sign their allowance of such indenture of apprenticeship before the same shall be executed by the other parties. This section does not absolutely avoid the indenture, but is only directory. The fifth section enacts, that no settlement shall be gained, unless such order shall be made, and such allowance of such indenture shall be signed as herein-before directed. The object of the statute was, that parish apprentices should not be bound without the consent of two justices. Here, the provisions have been substantially complied with; the order was duly made, and the allowance of the indenture signed by the magistrates. It is not necessary that the allowance should be under their hands and seals. The eleventh section does indeed enact, that no indentures, by reason of which any expense shall be incurred to the parish, shall be valid, unless approved of by two justices, under their hands and seals; but that section applies to cases where the parish officers help the parent to bind out the child, and not where the whole expense falls upon the parish. Here, the parish officers paid the whole 10*l*. As to the objection, that it does not appear whether the magistrates signed the indenture before the other parties, it is sufficient to say that every thing must be presumed to be rightly done unless the contrary appear. The statute of the 5 Eliz. c. 4, s. 26, directs that the binding in such cases as are within that act shall be for seven years; and section 41, declares that all indentures otherwise than is by that statute ordained, shall be clearly void in law to all intents and *purposes: yet a binding for four years confers a settlement, because the indenture is not absolutely void, but only voidable if the parties themselves think fit to take advantage of it. *St. Nicholas v. St. Peters*, Burr. S. C. 91; 2 Bott. 363; *Rex v. Evered*, 1 Bott. 534. In like manner, this indenture might be voidable, but was not absolutely void; and therefore service under it conferred a settlement.

Robinson, contra, was stopped by the Court.

BAYLEY, J. I am of opinion that this indenture is void, and consequently that no settlement was gained in the parish of Bawbergh. The statute of the 56 G. 3, c. 139, has introduced a variety of new regulations as to the mode of binding out parish apprentices. It requires that the child shall be carried before two justices, and they are to inquire into the propriety of binding such child apprentice to the person to whom it shall be proposed by the overseers to bind him; and if the justices shall, upon the inquiry, think it proper that the child shall be bound apprentice to such person, the statute then enacts that the justices shall make an order, declaring that such person is a fit person to whom the child may be bound as apprentice, and shall thereupon order that the overseer of the place to which the child shall belong shall be at liberty to bind such child apprentice accordingly; which order shall be delivered to such overseer as the warrant for binding such child as aforesaid, and such order shall be referred to by the date thereof and the names of the said justices, in the indenture of apprenticeship of such child; and after such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship before the same shall be executed by any of the other parties thereto." The statute requires specifically that the order should be referred to by the date; and the object of that might be, that the order might be found with facility at any future period. The statute then requires that the justices shall sign the allowance of such indenture. Now, the word "such" is not immaterial; and the reference to the order by date is either directory only, or it is of the essence of the indenture. I am of opinion that it means such an indenture as was before required, viz., one containing the date of the order of

justices. The fifth section then enacts, that no settlement shall be gained by any child who shall be bound by the officers of any parish, &c., by reason of such apprenticeship, unless such order shall be made, and such allowance of such indenture shall be signed as thereinbefore directed. There must, therefore, be an allowance, not of such indenture, but of such indenture as was thereinbefore directed, viz., of one referring to the order of justices by the date thereof. I doubt whether the eleventh section applies to such a case as the present, or whether it applies only to such cases where the binding is by the parents, and not by the overseers; but I am clearly of opinion that, construing the first and fifth sections together, this indenture is void, and that no settlement was gained in the parish of Bawbergh by the service under it.

BEST, J. The first and the fifth sections are to be taken together, and then there can be no doubt that a settlement was not gained in the parish of Bawbergh, *because in the indenture the order of the justices was not referred to by the date. Such indenture means the indenture before spoken of. Order of sessions quashed.

The KING v. MOSLEY, Bart.

By the Manchester and Salford police act, 32 G. 3, c. 69, rates were to be made upon "the tenants or occupiers of all messuages, houses, ware-houses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens or garden grounds, and other tenements situate within the towns of M. and S. respectively:" *Held*, that the owner of certain markets kept in the streets of M., in which various articles were exposed to sale, by persons who paid him for that privilege, but had not any stalls fixed to the ground, was not the occupier of a *tenement* within the meaning of the act; and therefore was not liable to be rated in respect of the profits of such markets.

UPON an appeal against a rate made on the defendant under the Manchester and Salford police act, 32 G. 3, c. 69, in respect of "market sites, streets, lands, and tenements, at the market-place, Shude-hill, Smithy-door, and at various other streets in Manchester, and the tolls, dues, rates, and profits in respect thereof." The sessions confirmed the rate, subject to the opinion of the Court on the following case. "The assessment and rate appealed against were duly made and allowed according to the requisites of the act. The markets for which the rate was imposed are held in the several places named, which are public streets in Manchester, and the public have a right to pass and repass over the same, subject to the right of holding the said markets by the appellant. The appellant is lord of the manor of Manchester, and owner of the markets there, and of all the waste lands within the manor. The emoluments received by him are collected by and paid to him, from the persons using the said markets and the sites thereof, for the privilege of exposing to sale there the commodities in which they deal. The baskets, sacks, tubs, and stalls, used *227] by such persons in the said markets, are *provided by themselves, and are either carried by them, or are placed upon the pavement of the said markets, but are not fastened to the ground.

J. Williams and *Starkie*, in support of the order of sessions, contended that the word *tenement*, as used in the act in question, was large enough to embrace the subject-matter of this rate. But the Court said, that the meaning of the word *tenement*, as used in this act, had been under their consideration on a former occasion; and that they were satisfied that it was intended to be applied to those things only which were *ejusdem generis*, with those particularly enumerated, and was not intended to be used in the larger sense sometimes given to it; that the subject of the present rate, not being of the same nature as any of the descriptions of property specified in the act, was not liable to be rated; and that the order of sessions confirming the rate must therefore be quashed.

Order of sessions quashed. (a)

Littledale and *Park* were to have argued against the rate.

(a) See *Rex v. Company of Manchester Water Works*, ante, vol. i. p. 630.
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elegit issued in pursuance of the judgment. The affidavits in support of the rule stated, that by an indenture of the 1st of May, 1818, in consideration of 11,000*l.* paid by Morris to Jones, the latter granted to the former an annuity of 1429*l.*, and for further security executed a warrant of attorney, by virtue of which judgment was afterwards entered up in Trinity term, 58 G. 3; and that for the consideration mentioned in the indenture as the consideration for granting the annuity, Jones, by another indenture of the same date, assigned to Morris three policies of assurance effected upon his, Jones' life, to the amount of the 11,000*l.*; and that those policies, at the time of the assignment, were of the actual value of 1135*l.*, and would have been purchased at that price by the different companies with whom the same had been effected respectively. The annual premiums upon these policies amounted to 659*l.* If new policies had been effected at the time when the assignment was executed, the premiums would, by reason of the advanced period of Jones' life, have amounted to 744*l.* It was stated, that it was part of the original contract between the *parties, that the policies should be assigned; and that it was partly in consideration [*233 of such assignment that Morris had agreed to give the 11,000*l.*: and that no memorial of the assignment of the policies was enrolled in the Court of Chancery. The affidavits in answer to the rule stated, that in 1817 a proposal was made to Morris, on the part of Jones, to advance 11,000*l.* upon an annuity which was to yield 7 per cent. clear, and to be secured upon landed estates of which Jones was tenant for life; and it was expressly stated, that Jones' life was then insured for 11,000*l.*, and that the policies would be assigned to the grantee of the annuity, to be reassigned by him whenever the annuity was redeemed. The affidavits further stated, that in the negotiation for the annuity, it was expressly stipulated, that Morris was not to be at liberty to surrender or sell the policies, but that in the event of the annuity being redeemed, they were to be reassigned; that they were of no pecuniary value to him, and that he would have refused to purchase them if Jones had offered them for absolute sale. In a letter written, pending the negotiation for the annuity, by the solicitor of Jones, and which accompanied the abstract of his title to the estate upon which the annuity was to be secured, it was stated, that 11,000*l.* was to be advanced for an annuity of 7 per cent., in addition to the premiums of insurance upon Jones' life, upon which policies to that amount had already been effected, and would be assigned to the party making the advance; and the premiums upon those policies were stated to amount to 659*l.*; which sum, added to 770*l.*, the amount of the annuity at 7 per cent., made together 1429*l.* The deed by which the annuity was granted, as well as that by which the policies were assigned, were annexed to the affidavits. *It appeared by the former that the annuity was granted for sixty years, if Jones should so long live, [*234 and charged upon certain landed estates in the county of Monmouth, of which Jones was tenant for life; and these estates were by the deed conveyed to trustees for ninety-nine years, if Jones should so long live, upon trust for better securing the annuity; and the annuity was to be redeemable at three months' notice, upon payment of 11,359*l.*, and all arrears and costs. By the deed of assignment it appeared, that two of the policies had been effected in April, 1813, and the other in June, 1813; and it was stipulated, that if Jones should redeem the annuity, Morris should reassign the policies to him. It did not contain any express covenant by Jones or Morris to keep up the insurance.

The *Solicitor-General* (and *Tindal* was with him) now showed cause. The policies were not purchased by the grantee of the annuity. They were assigned to him by a different deed, as a collateral security only for the payment of the purchase-money, in the event of the death of the grantor. The statute 53 G. 3, c. 141, does not require that there should be a memorial of every deed by which the annuity is secured, but only of the deed by which it is granted. Now

here there is a memorial of that deed, and the pecuniary consideration is stated in the memorial, and that is sufficient.

Scarlett and Evans, contra. The 11,000*l.* was not the true consideration for the grant of this annuity, because, in point of fact, policies of the then actual value of 1135*l.*, were assigned to the grantee of the annuity. It is true, that he did not purchase the policies, but by holding them he was enabled to *235] insure the life of the grantor, at a less annual premium than if he had effected new policies on his life. It appears by the affidavits that the grantee saved by this arrangement an annual expense of 85*l.*; that was part of his purchase, and the 11,000*l.* was the consideration for that and the annuity. The true consideration, therefore, is not stated in the memorial. They cited *Byne v. Fyrian*, 5 Ves. 604.

ABBOTT, C. J. I am of opinion that all has been done in this case which is required by the 53 G. 3, c. 141, s. 3. If more is required to prevent the mischiefs contemplated by this statute, that must be provided for by a new act of the legislature. The statute, in one view of it, is remedial, and in another penal, for it makes void all the securities. When questions on the former annuity act first came before the Court, the act was considered to be wholly remedial, but in progress of time the Court considered it both penal and remedial. At one time it was thought that every trust should be set out in the memorial; but that is not necessary. The question now is, what does the 53 G. 3, c. 141, s. 2, require. It enacts, that "within thirty days after the execution of any deed, &c., whereby an annuity may be granted, a memorial shall be enrolled, and that the memorial shall, among other things, contain the *pecuniary* consideration or considerations for granting the annuity in the form or to the effect following." Then follows a general form of the memorial, and one of the columns is headed, "Consideration, and how paid;" and under it are the words "100*l.* in money, so much in notes or bills of exchange." It appears, therefore, both from the *236] words of the enacting clause, and from the general form of memorial given, that the *pecuniary* consideration is the only consideration contemplated by the legislature; and in this case the pecuniary consideration mentioned in the deed is stated in the memorial. But it is said that the consideration for granting this annuity is not truly set out in the memorial, inasmuch as the sum of 11,000*l.* was paid, partly for the purchase of the annuity, and partly for the assignment of the policies, which had been effected some years before; and it is urged, that the grantee by such assignment, actually derived a present pecuniary benefit, because he was thereby enabled to insure the life of the grantor at a less annual premium than he otherwise could have done. Now, when an annuity is granted for the life of the grantor, it is almost the invariable practice for the grantee to insure the life of the grantor; and in calculating the amount of the annuity or the consideration to be paid, regard is always had to the terms on which that life can be insured. The amount of the premium depends upon the age of the grantor, and the state of his bodily health; yet neither of those circumstances are ever mentioned in the memorial. And in this case, the purchaser must be supposed to have paid something more for the annuity of 1429*l.*, or to have received a smaller annual payment for that consideration paid, in consequence of his having the policies assigned to him, and being thereby enabled to insure at a less premium than he otherwise could have done. It appears by the affidavits, that the policies were assigned, not as something of present pecuniary value, but merely to enable the grantee to insure the life of the grantor at a less annual expense than he could have done upon a fresh *237] policy. There was no purchase of the policies: the assignment was only for the security of the purchase-money, in the event of the death of the grantor. I think that we should introduce too much subtlety into the construction of this act, if we were to hold that this assignment ought to be stated in the memorial. We might next be called upon to set aside securities

for an annuity, upon the ground, that the consideration was calculated with reference to a representation of the bodily health of the party for whose life the annuity was granted, which representation afterwards turning out to be unfounded, the grantee was enabled to insure the life at a much less annual premium than that which the parties calculated as the amount of the premium at the time when the consideration was paid. I think this objection ought not to prevail. This rule must, therefore, be discharged.

BAYLEY, J. I think that the annuity act does not apply to the deed by which the policies were assigned to the purchaser of the annuity. Looking to the substance of the transaction, the object of one party was to grant, and of the other to purchase an annuity. The money to be paid for the purchase of such annuity was 11,000*l*. That sum came out of the hands of the grantee, and he was to receive 7 per cent. per annum besides what would be sufficient to cover the annual expense of insuring the life of the grantor. The annual payment to be made by the grantor was, with reference to that expense, fixed at 1429*l*. Now, if the sum of 11,000*l*. can properly be considered as the consideration for the purchase of the annuity, the consideration is properly set out in the memorial. The argument is, that the 11,000*l*. was paid for the purchase of the annuity, and of something else; and it is suggested, that in consideration of the grantor's having assigned the policies to the grantee, the latter was enabled to effect the insurances at a less premium than he otherwise could have done; and, therefore, that the 11,000*l*. was in fact paid for an annuity of 1429*l*. per annum, and the present pecuniary value of the policies assigned, or at least of that benefit which the grantee derived by paying a less premium than he otherwise would have done. But I think that that is not the true statement of the contract. The object of the grantee was, the purchase of an annuity, and nothing else. The result would have been the same to the parties, whether new policies were effected, or the old ones were assigned; for if the premium of insurance had been higher, the annual payments would have been so much the greater. The parties were stipulating, not for the purchase of the policies, but of an annuity, and the consideration to be paid for that annuity was fixed in the first instance. The policies were only a collateral security for the payment of the purchase-money in the event of the death of the grantor. For these reasons, I am of opinion that the consideration was properly stated in the memorial, and, consequently, that this rule must be discharged. [238]

HOLROYD, J. I am of the same opinion. We are now called upon to carry into execution this act of parliament penally, by setting aside the warrant of attorney. Now the act itself requires, not that all the deeds, or even the effect of all the deeds connected with the transaction, should be memorialized, but only that the deeds granting the annuity, and the particular things there pointed out with respect thereto, should be stated in the memorial. It is sufficient if all these things have been mentioned in the memorial; and although in the course of the transaction some further act may have been done, for the more easily enabling the purchaser of the annuity to secure to himself the repayment of his purchase-money, in case of the failure of the annuity by the death of the grantor before its redemption, that act is not required, I think, to be noticed in the memorial. Now here, the memorial does contain the date of the deeds whereby the annuity was granted, the names of all the parties and witnesses, and the person for whose life it is granted, and the person by whom it is to be beneficially received, and the pecuniary consideration for granting the same, and the annual sum to be paid. It is said, however, that the sum of 11,000*l*. was not the consideration paid for the annuity, but that it was paid as a joint consideration for the purchase of the annuity, and of some interest in the policies. But upon the facts disclosed in this case I think that the 11,000*l*. is to be considered as the consideration paid for the purchase of the annuity only, and that the assignment of the policies was only a further act done for [239]

better enabling the grantee to secure the reimbursement of the purchase-money, in case of the loss of his annuity. It appears from the affidavits, that the bargain between the parties was, that Morris should advance 11,000*l.* to Jones, and that the latter should grant in return an annuity, which was to yield to the former 7 per cent. clear, to be secured upon landed estates, of which Jones was tenant for life; and for the purpose of securing the reimbursement of the purchase-money, in the event of the death of Jones before redemption, by which the annuity would cease, it was proposed by Jones to assign to Morris policies *240] already effected on his life. The mode of calculating the amount of the annuity payments at 1429*l.* was, by adding 659*l.*, the annual premium payable upon the policies, to 770*l.*, 7 per cent. upon the purchase-money. The object of the grantor of the annuity was, to borrow the sum of 11,000*l.* at the smallest annual expense to himself; and for his convenience, the old policies were agreed to be assigned, instead of new policies being effected. The object of the grantee was to purchase an annuity of 770*l.* clear, and nothing else. The amount of the expense of insuring the life of the grantor was wholly immaterial to the grantee, for he was, at all events, to receive a clear annuity of 770*l.* per annum. If new policies had been to be effected at an advanced premium, the annual payments of insurance, and consequently the aggregate annuity of 1429*l.*, would have been proportionably increased; but the consideration to be paid for the annuity was fixed in the first instance. The annual payments were not fixed in the first instance, except that their amount was to be according to what was the amount of the annual expense of insuring Jones' life; and the existence of certain policies which enabled the grantee to insure the grantor's life at an annual expense of 659*l.* was the reason for fixing 1429*l.* as the sum to be paid by way of annuity. It is clear, therefore, that the grantee could have no motive to purchase any interest in the policies assigned. They were assigned solely for the benefit of the grantor, to relieve him from a greater annual expense than he would have subject to by increasing the whole amount of the aggregate annuity, in case those policies had not been assigned, and the grantee had had to make fresh insurances in lieu of having them for his *241] security in the event of the grantor's death before the annuity was *re- deemed. If the deed of grant had stated that 770*l.* was the annuity granted for a consideration of 11,000*l.* (which is the substance of the transaction,) and by a different deed the grantor had covenanted, that he would for further securing the grantee against loss by the ceasing of the annuity granted by reason of the grantor's death, pay to the insurers 659*l.* annually, the amount of premiums upon policies already effected upon his life, or that he would pay that sum to the grantee in order to enable him to keep up the insurances; it would have been sufficient, I think, to state in the memorial, that the 11,000*l.* was the consideration paid for the annuity of the 770*l.*, and the latter deed need not, I think, have been noticed. The parties, however, by reserving annual payments sufficient in amount to enable the grantee to pay the premiums, have done substantially the same thing, although it is not explained upon the face of the deed of grant in what manner that portion of the annual payments beyond the sum of 770*l.* is to be applied. That does sufficiently appear from the affidavits before us. But inasmuch as the act of parliament requires that the annual sums to be paid by the grantor to the grantee should be stated in the memorial, and as 1429*l.* was the annual payment reserved by the deed of grant, it became necessary so to state it in the memorial. I think, however, that the 11,000*l.* was properly stated in the memorial as the consideration actually paid for the annuity granted. That was the only pecuniary consideration paid, and it was paid in one entire sum. It is impossible to say that any specific part of it was paid for the policies assigned. It was paid for an annuity of the amount reserved by the deed, it being also agreed between the parties that the grantee

should apply part of *that annuity towards defraying the expense of keeping up policies of insurance, which, in one event, were to be a security for the repayment of the consideration money, and in another were to enure to the benefit of the grantor. The assignment of the policies was ancillary to the grant of the annuity, and was merely an act done for further securing the grantee against the loss of the purchase-money of his annuity. [*242

Rule discharged.

Where a warrant of attorney contained a stipulation that execution might issue upon the judgment, after a year and day, without reviver by scire facias, held that the parties might lawfully make such a bargain, and that the execution was good. An application was made to set aside the inquisition taken on an elegit, because it appeared that all the defendant's lands were extended. Held that the inquisition was altogether void, and that the application to set it aside being unnecessary, the rule for that purpose must be discharged.

In Michaelmas term, *J. Evans* moved to set aside two writs of elegit and the inquisitions taken thereon, which had been issued on a judgment entered up upon a warrant of attorney, given to secure the above-mentioned annuity. First, on the ground that the judgment was above a year and a day old, and had not been revived by scire facias before the execution issued. The warrant of attorney contained a stipulation that no objection should be taken on that ground; but as at common law, the party, after a year and a day, was put to his action on the judgment, and it is only by stat. Westm. 2, 13 Ed. 1, st. 1, c. 45, that he is enabled to have execution upon it, by suing out a scire facias, the consent of the defendant cannot render compliance with that form unnecessary. This is analogous to the case of a warrant of attorney given by a party in custody. A rule of court requires that an attorney should be present on behalf of the defendant, and his consent does not obviate the necessity of his presence. Secondly, both the inquisitions included copyhold lands, which cannot be extended. Thirdly, under the second elegit, the whole of the defendant's property left after the first elegit, was extended.

**Per Curiam*. If a party chooses to bargain that execution shall issue on an old judgment without reviver, we cannot say that such a bargain is so unlawful as to justify us in setting aside the elegit. [*243 The case of a warrant of attorney given by a prisoner is different, because there the party is acting under duress.

Upon the other objections a rule nisi was granted to set aside the first inquisition as to the copyhold lands; and the second altogether; against which

Tindal showed cause, upon affidavits, which denied that any copyhold lands were extended. As to the other ground, the return to the second elegit was altogether void; it was a mere nullity; and the defendant need not have applied to this Court to set it aside. *Fenny dem. Masters v. Durant*, 1 B. & A. 40.

Brougham and *Evans*, contra, contended that the latter was a ground for the summary interference of the Court; for that notice had been given to the tenants to pay over their rents to the plaintiff, and although that might be illegal, and the defendant might recover those rents, still he would be much prejudiced.

Per Curiam. The rule must be discharged. It being doubtful whether copyholds have or have not been extended, the Court will not decide that upon affidavits. As to the other point the case cited shows that the second inquisition is void in itself, and that the interference of this Court is perfectly unnecessary.

Rule discharged.

*244] *In the matter of BLANSHARD, BAXTER and Others.

The Court of Admiralty have, in a cause of possession, jurisdiction to take a vessel from a mere wrong-doer and to deliver it to the rightful owner; and therefore, where it appeared upon a rule nisi for a prohibition to restrain the Admiralty Court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in allegation, by which it appeared that he was the registered owner, and that the vessel had wrongfully come into the possession of the defendants and the latter had not pleaded any title, the Court discharged the rule for a prohibition.

EVANS, in Easter term, had obtained a rule nisi for a prohibition to restrain the Court of Admiralty from proceeding in this cause. It appeared by the affidavits, that, in October, 1821, the ship Partridge, then being at Bombay, was sold by public auction, by order of Beetham the captain, to a native merchant there. Beetham deposited the certificate of the registry with the collector of the customs at Bombay, and caused the same to be cancelled. Baxter and Osborn purchased the ship of the native merchant and repaired her. She arrived in London in July, 1822, and Blanchard claimed her, and instituted a suit in the Court of Admiralty, for the purpose of recovering possession of the ship, in a cause of possession, and by virtue of a warrant, issued by the authority of the Instance Court, the ship was arrested. A copy of the proceedings in the Admiralty Court were annexed to the affidavit; and it appeared by them, that the proctor of Baxter and Osborn asserted them to be the owners of the ship, in the presence of Blanchard's proctor, who alleged, that in 1820, Blanchard, being the sole registered owner of the ship, and having an intention of fitting her out on a voyage to Madras and Calcutta, appointed one Beetham to the command, and directed him to proceed to Madras and Calcutta, and to place himself and the ship and cargo there under the care of certain persons named, and to receive on board a cargo from the consignees, and to return to London; that the *ship, being then worth 10,000*l.*, did proceed to Madras and

*245] Bengal, with a certificate of British registry, granted by the commissioners of customs to Blanchard, as sole owner; and having discharged her cargo, Beetham took in a return cargo, and while on her homeward voyage, the ship, in January, 1821, struck on a shoal, and received some damage, and in consequence put into Bombay on the 19th January. On the 16th February she was put into a dry dock for the purpose of being repaired; surveys were held, and the surveyors reported, that the vessel, when repaired, would be in a fit state to proceed to Europe, and that she was in every way sound and seaworthy, and worthy to be repaired. Beetham, notwithstanding, countermanded the orders for the repairs, and, without any authority from Blanchard or his agent, requested Baxter and Osborn, then merchants at Bombay, to make sale of the ship, and in consequence she was sold by public auction on the 5th March for 2050*l.*, to a native merchant there. Within two days after such sale, Baxter and Osborn declared themselves to be the purchasers, and Beetham executed to them a bill of sale; it was further alleged by Blanchard's proctor, that when the ship was put up to sale, Baxter knew that Beetham had no authority to sell, and that the sale was illegal and unnecessary, and that within nine days after the sale, the ship having undergone the necessary repairs, was, by Baxter, advertised for a voyage to England, but was in fact sent on a voyage to China and afterwards to England, where she arrived on the 24th July, 1822. The necessary repairs might have been done for 1000*l.*, and the money for that purpose might have been raised at Bombay by hypothecation and on bottomry.

*246] Blanchard's proctor then prayed the judge *to dismiss the bail given in the cause, and to condemn the other party in expenses.

Scarlett and *F. Pollock* showed cause. It appears from the affidavits and proceedings in the Admiralty Court, that Blanshard being the sole registered owner of the vessel, Baxter and Osborn have wrongfully got possession of it; the latter do not appear to claim any title to the ship, non constat therefore, that the Court of Admiralty will be called upon to adjudicate upon such title. There is no ground, therefore, for a prohibition, because it is quite clear that the Court of Admiralty have jurisdiction to take a vessel out of the possession of a mere wrong-doer and deliver it to the rightful owner.

Evans, contrâ. 'The Court of Admiralty have no jurisdiction in this case, because the contract for the sale of the ship was made upon the land, and not upon the high sea. *Bridgeman's case*, Hob. 11, is precisely in point. In the *Spanish Ambassador's case*, Hob. 78, "it was resolved by the whole Court that the Admiralty can hold no plea of any contract but such as arises upon the sea, although it arise upon any continent, port, or haven, out of the king's dominions, for the jurisdiction is limited by the statutes to the sea only. And if the cause arise at land, or in a port, (for no port is part of the sea but of the continent,) then he cannot sue in the Admiralty Court, but must sue in the courts of common law." *Palmer v. Pope*, Hob. 79, and *Don Alonso v. Cornero*, Hob. 212, are also authorities for this point. So where a French ship, Marsh. 110, was *taken by a Spanish privateer, and before it could reach any Spanish port, was driven by the winds into Weymouth, and sold [*247 there. The French owner sued the vendee in the Admiralty Court, on the ground that the captors were pirates. A prohibition was prayed, and *FOSTER*, J. and *BANKS*, C. J., were of opinion that there ought to be a prohibition, because the sale had been on the land. 'The case of the *Barbara*, 4 Rob. 1; *Veltshasen v. Ormesly*, 3 T. R. 313; *Sands v. Child*, 4 Mod. 176; Sir T. Raym. 489, are authorities for the same position. [*BAXLEY*, J. It does not appear by the proceedings in the Court of Admiralty, that Baxter has ever put in issue the right to the property of the vessel. If he had pleaded that the ship was his, and not Blanshard's, your argument might apply. But as far as the proceedings go. Baxter appears to be wrongfully in possession of a ship belonging to Blanshard, and the latter may have instituted a suit against Baxter, for the express purpose of preventing him from carrying the vessel out of the kingdom.] In *Powell v. Robinson*, Bunb. 9, the admiralty had granted a warrant to seize a ship, and before any libel was exhibited, a prohibition was moved for, and it was objected that it ought not to go, because it did not appear that the admiralty had no jurisdiction, but the prohibition was granted. *Roberts v. Cadd*, Bunb. 247.

ABBOTT, C. J. As far as the affidavits inform us of the proceedings in the Court of Admiralty, it appears that a suit had been instituted there by Blanshard, and that the ship had been seized by virtue of a warrant issued in that cause. Baxter and Osborn, *by their proctor, then claimed the vessel [*248 as owners; and the proctor of Blanshard being present, then states facts, from which it appears that Baxter and Osborn were wrongfully in possession of a vessel of which Blanshard was the registered owner, and the proceedings conclude by Blanshard's proctor praying the judge to dismiss the bail, and to condemn Baxter and Osborn in costs. In this stage of the proceedings, the proctor of Baxter and Osborn not having pleaded their title to the ship, this rule was obtained for a prohibition. We cannot say what judgment the Court of Admiralty would have pronounced upon the facts alleged; and we are not to assume that that court would have proceeded with the cause if the proctor of Baxter and Osborn had exhibited articles, and had pleaded their title; and if we made the rule absolute for a prohibition in this case, it must be upon the ground, that the Court of Admiralty have no jurisdiction, in a mere cause of possession, to take a ship out of the power of a wrong-doer and give it to the right owner. Such a jurisdiction, however, has been exercised by that court for a very long

period of time. It has been the constant practice in disputes between part-owners as to the employment of the vessel, where the majority in value of the share-holders are desirous to send the vessel on a voyage to which the minority will not consent, for the Court of Admiralty to arrest the ship at the instance of the latter, and to take from the majority a stipulation in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares.

*249] Although the jurisdiction of the Admiralty in such cases was once *doubted, there are several authorities^(a) recognising it; and it may now be taken to be settled, that in disputes between part-owners as to the employment of a ship, the Court of Admiralty may arrest and detain the ship, until security be given to the amount of the value of the shares of those part-owners who dissent from the particular employment. Now as part-owners of a vessel have a distinct, although undivided, interest in the whole vessel, they cannot be considered as absolute wrong-doers by the act of using a vessel of which they are proprietors. If, therefore, the Court of Admiralty have jurisdiction to detain the vessel at the instance of one part-owner, until the others give security to the extent of their shares, a fortiori, it must have such a jurisdiction to detain the vessel in a suit instituted by the real owner against a mere wrong-doer; and I must observe, that this proceeding, by which the thing itself is taken out of the possession of a wrong-doer, and put into that of the right owner, is a most useful part of the jurisprudence of the country. Unless it were allowed, a ship-owner might, in many cases, sustain a serious injury and be without any remedy; for if he could only sue the wrong-doer, the latter might be unable to pay the value of the ship, and might, pending the suit, send it out of the country. Inasmuch then as it does not appear by the proceeding, that the Court of Admiralty are about to determine any question over which they have not jurisdiction, I am of opinion that this rule must be discharged.

Rule discharged.

(a) See the cases collected in Abbott on Shipping, part 1, chap. 3, s. 4, 5, and p. 91, 4th ed.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF GEORGE IV.

BUTLER v. CAPEL.

In the memorial of an annuity, enrolled pursuant to the 53 G. 3, c. 141, an instrument was described as an assignment of certain leasehold premises. The instrument was, in fact, an under-lease: *Held*, that the description given was a sufficient compliance with the statute.

DEBT on bond. Defendant cravedoyer of the bond and condition, which (after reciting that one J. W. had agreed to sell an annuity to plaintiff, and to secure it by a demise and assignment; and in pursuance thereof did, by indenture, covenant to pay the plaintiff an annuity of 150*l.* per annum, which indenture contained a demise of certain leasehold premises therein described,) was for the due payment of the said annuity; and pleaded, first, *non est factum*; secondly, no memorial of the said indenture enrolled within thirty days after the execution of it, as required by the 53 G. 3, c. 141; thirdly, that no memorial of the said indenture correctly describing the nature of it, and the property thereby intended to be charged for securing the payment of the annuity, was enrolled as required by the said act. Replication to second and third pleas, that such memorial was duly enrolled, and assignment of breach, non-payment of 225*l.* for one year and a half of the said annuity. At the trial before ABBOTT, C. J., at the London sittings before this term, upon the production of the indenture mentioned in the condition of the bond, it appeared that J. W., the grantor of the annuity, was entitled to certain lands, houses, and premises, for the residue of a term of 1000 years; and for securing the annuity, did grant, bargain, sell, and demise the said premises to certain persons therein mentioned as trustees, for and during all the rest, residue, and remainder then to come and unexpired of and in the said term of 1000 years therein, except the last ten days of the said term, yielding and paying a peppercorn rent. The memorial described this deed as "a grant of an annuity of 150*l.*, and an assignment of certain hereditaments and premises for securing the same." For the defendant, it was contended that this was a misdescription of the deed, and did not satisfy the requisites of the 53 G. 3, c. 141. That the annuity was therefore void, and consequently no action could be maintained upon the bond. The lord chief justice overruled the objection, but gave the defendant leave to move to enter a nonsuit. The plaintiff having obtained a verdict,

The *Solicitor-General* now moved accordingly, and contended that an assign-

ment differed very materially from an under-lease. A party taking an assignment is liable to the whole rent reserved and all the original covenants, but an under-lessee is only liable to the *covenants in his under-lease; and in this very [253 instance, instead of the original rents, a nominal rent only was reserved by the under-lease. This court has required a very strict compliance with the directions given in the schedule to the 53 G. 3, c. 141. *Smith v. Pritchard*, 5 B. & A. 717. The indenture is in effect an under-lease, and the memorial improperly describes it as an assignment. The plaintiff has therefore failed to comply with the terms imposed by the legislature, and a nonsuit must be entered.

Per Curiam. If the plaintiff had in pleading alleged that there was an assignment of certain premises, he would not have proved his allegation by the production of the instrument in question. For, in strict legal phraseology, an instrument does not operate as an assignment unless the grantor parts with the whole of his interest, but in common parlance it is otherwise. Now the schedule of the 53 G. 3, c. 141, requires, that the nature of the instrument should be inserted, and that is satisfied by a description of the instrument in popular language, although that be not according to its strictly legal effect. In *Harrison v. Vallance*, 1 Bing. 45, the declaration, which was in trover, described a certain deed as "an assignment purporting to be a conveyance;" and it was held to be sufficient, although in fact the conveyance was by lease and release. There is not then any sufficient ground for this motion.

Rule refused.

*CLARK v. The Inhabitants of the Hundred of BLYTHING. [254

Where the owner of certain stacks of hay and corn, which were maliciously set on fire, received the amount of his loss from an insurance office: *Held*, that he might nevertheless maintain an action against the hundred on the 9 G. 1, c. 22.

CASE on the 9 G. 1, c. 22, to recover from the hundred satisfaction and amends for certain stacks of hay and corn which had been wilfully burnt, in the hundred of B., by some person unknown. The declaration stated the damage to have been done within one year before the commencement of the action; that within two days after the committing of the offence, the plaintiff gave notice of it to three of the inhabitants of H., that being a town near the place where it was committed; and within four days after such notice was given, plaintiff gave in his examination before a magistrate of the county, residing in the hundred of B., by which it appeared that the said stacks were set on fire by some person unknown; and that plaintiff did not know the person who committed the said act. Averment, that six months and more had expired, and that the offender had not been apprehended or convicted. Yet the inhabitants of the hundred of B. had not, although often requested, made full or any satisfaction or amends to plaintiff for the damage and injury by him sustained as aforesaid, to the damage of plaintiff 200*l.* Plea, not guilty. At the trial before *Bosanquet*, Serjt., at the last Suffolk assizes, all the allegations in the declaration were proved, but it appeared that the plaintiff's premises and stock had been insured, and that he had received from the insurance office the amount of his loss, and it was contended for the defendants, that under these circumstances the plaintiff was not *entitled to recover. The learned serjeant overruled the objection, but gave the defendants leave to move to enter a nonsuit. The plaintiff [255 having obtained a verdict,

Storks now moved accordingly. The plaintiff in this action having received from the insurance office the amount of his loss, had not, at the time when the action was brought, sustained any damage by the fire. To allow him to recover in this action, would therefore be contrary to the words and policy of 9 G. 1, c. 22, s. 7, upon which the action is founded. That section enacts, that the hundred shall make satisfaction and amends to every person for the damage that he

shall have sustained by the setting fire to any stack, &c., by any offender against that act. It is manifest that the legislature there contemplated a reparation to the party injured alone, and not to any third person who might have insured his premises. So also, in the 3 G. 4, c. 33, ss. 3 and 4, which regulate the mode of recovering the damages occasioned by offences against the 9 G. 1, c. 22, the legislature evidently speak of a recovery by the party whose property is injured or destroyed. In *Hyde v. Coggan*, 2 Doug. 699, the 1 G. 1, st. 2, c. 5, and 9 G. 1, c. 22, are said to be remedial, to relieve the party injured by the unlawful act. In this case the plaintiff has not sustained any injury, having received the amount of his loss from the insurers, and they cannot sue the hundred in his name. There is indeed a case mentioned in Marshall on Insurance, v. 2, p. 796, *Mason v. Sainsbury*, in which a contrary opinion appears to have prevailed.
 *256] That was an action on the 1 G. 1, st. 2, c. 5, the *plaintiff had recovered the amount of his loss from an insurance office, for the benefit of which the action was brought in the plaintiff's name, and with his consent; and this court held that the action was maintainable. That case, however, does not appear to have undergone much discussion, and as there is not any other to be found bearing on the point, it is certainly worthy of further consideration.

ABBOTT, C. J. The point upon which this motion has been founded, was decided in this court many years ago by the case of *Mason v. Sainsbury*. Unless there be some serious doubt as to the propriety of that decision, we ought not now to disturb it. I cannot bring myself to entertain any doubt of its propriety. It is plain that the intent of the legislature in this act, and others of the like nature, was to make the inhabitants of hundreds vigilant for their own sakes, by making it their interest to prevent the commission of offences, and where that could not be done, to exert themselves to bring the offenders to justice. The act in question has provisions applicable to both those objects; the 7th section renders the inhabitants of the hundred liable to make amends for the loss or damage sustained; but the 9th section provides, that they shall not be liable if the offender be apprehended and convicted within six months after the offence committed. For these reasons, independently of any question as to the competency of the defendants to set up as a defence, a contract entered into between third persons, I am of opinion that the principle of the act fully justifies the former decision, and that we ought now to abide by it.

Rule refused.

*257] *The KING v. D. W. HARVEY and CHAPMAN.

A libel imputed that his majesty laboured under mental insanity; and it stated that the writer communicated the fact from authority. Upon the trial of the information, the publication of the libel was proved. It was admitted by the defendants that the statement in the libel was untrue, and they did not offer any evidence to show that they had any authority for making it; and the judge in his charge to the jury having stated that it was a criminal act to assert falsely of his majesty or of any other person that he was insane, and it being admitted by the defendants themselves that the fact stated in the publication was false, in his opinion it was a libel: *Held*, that this direction was correct in point of law, and that the judge was warranted in saying that the defendants had admitted the charge contained in the libel to be FALSE; for assuming that there might be a distinction between a mere untruth and a criminal untruth, and that the term "false" applied only to the latter, still as the defendants had stated that they communicated the fact from authority, and had not proved that they had any such authority, they must have been guilty of a criminal untruth or falsehood by stating as a fact, the knowledge of which they had derived from authority, that which was untrue, and for which they had no authority.

The jury having retired for a considerable time, returned into court, and desired to know whether it was necessary that there should be a malicious intention in order to constitute a libel; to which the judge answered, "The man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary." *Held*, that this answer was correct in point of law, and that the judge was not bound to answer in the affirmative or negative the abstract question put to him; and assuming that a malicious intention is necessary to constitute a libel, that intention is to be inferred from the mischievous tendency of the publication itself, unless the defendant shows some-

thing to rebut such inference, and therefore that the publication of a libel of mischievous tendency having been proved, and the defendant not having shown that he published it from authority, the jury were bound to find that he published it with a malicious intention.

THIS was an information filed by his majesty's attorney-general against the defendants, for a libel, contained in a newspaper of which the defendant Harvey was the proprietor, and the other defendant the printer and publisher. The libel was the leading article in the paper, and headed "Latest Intelligence—The King," and began in the following words; "Attached as we sincerely and lawfully are to every interest connected with the sovereign, or any of his illustrious relatives, it is with the deepest concern we have to state, that the malady under which his majesty labours is of an alarming description. It is from authority we speak." The libel then stated several facts relating to the king's illness, and concluded by alleging that his disorder was of an hereditary description. At the trial before *ABBOTT, C. J.*, at the London sittings after [*258 last term, the publication of the libel was proved in the usual manner; and it was admitted by the counsel for the defendants, that the libel imported that the king laboured under insanity, and that that assertion was untrue; but it was urged to the jury that the defendants believed the fact to be true, and that they were warranted in so doing by rumours which had been very prevalent on the subject. The lord chief justice, in his address to the jury, after stating the import of the publication, proceeded as follows: "To assert falsely of his majesty, or of any other person, that he labours under the affliction of mental derangement, is a criminal act. It is an offence of a more aggravated nature to make such an assertion concerning his majesty than concerning a subject, by reason of the greater mischief that may thence arise. It is distinctly admitted by the counsel for the defendants, that the statement in the libel was false in fact, although they assert that rumours to the same effect had been previously circulated in other newspapers. Here the writer of this article does not seem to found himself upon existing rumours, but purports to speak from authority; and inasmuch as it is now admitted that the fact did not exist, there could be no authority for the statement. In my opinion the publication is a libel calculated to vilify and scandalize his majesty, and to bring him into contempt among his subjects. But you have a right to exercise your own judgment upon the publication, and I invite you so to do." After the jury had retired about two hours they returned into court, and the foreman said that the jury wished to have the opinion of the lord chief justice, whether it was or was not necessary that there should be a malicious intention to constitute a libel. To this question [*259 the lord chief justice returned the following answer: "The man who publishes slanderous matter, in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary. There may indeed be innocent publications of that which, in its own nature, is injurious to another, as, for instance, the delivery of a book containing libellous matter to a magistrate; but the general rule is, that a person must be taken to have intended to do that which his act is calculated to effect." The jury again retired for about three hours, and then returned a verdict of guilty; but recommended the defendants to mercy.

Denman and *Brougham*, for the different defendants, now moved for a new trial, upon the ground of misdirection; and they made three points: First, that the lord chief justice had stated to the jury, that the defendants' counsel had admitted the statement in the libel to be false in fact, using that word to denote a criminal untruth. Secondly, that the question put by the jury, on their return into court, had not been distinctly answered; and, thirdly, that the observations made by the lord chief justice, by way of answer to that question, were calculated to mislead the jury. As to the first point, the fact imputed by the libel was admitted to be untrue, but not to be false or untrue in the knowledge

of the defendants; for it was urged to the jury that the defendants believed the fact, and that they were warranted in so doing from the rumours which had prevailed very generally. The fact of such rumours having existed might be within the knowledge of the jury themselves, and might, at all events, be collected from the terms of the publication itself. The mere untrue assertion of a fact is not in all cases criminal. Where a master is called upon to give the character of a servant, the assertion must be malicious as well as untrue to make it criminal. Here the impression conveyed to the minds of the jury was, that the defendants had admitted that they had asserted a fact which they knew to be false. In *Haycraft v. Creasy*, 2 East, 91, where the plaintiff, a person in trade, made an inquiry concerning the credit of another, and the answer was, that he might safely be credited, and that he (the person giving the information) spoke this from his own knowledge and not from hearsay; it was held that the assertion of knowledge meant no more than a strong belief, grounded upon what appeared to the party to be reasonable and certain grounds. The words used in this case are not stronger than those in the case cited. [BEST, J. There fraud was the gist of the action; and, therefore, it was necessary to show, not only that the statement was untrue, but that it was made *malo animo*.] Secondly, the abstract question put by the jury was not distinctly answered. They were not told whether a malicious intention were or were not necessary to constitute a libel. They appear to have thought correctly in the first instance that, although the fact asserted in the libel was untrue, yet it was not criminal, unless it were malicious as well as untrue, and the question ought to have been answered distinctly in the affirmative or the negative; for in consequence of the answer which was given, they may have been induced to think that it was wholly immaterial whether the intention was malicious or not. They may have founded their verdict upon the circumstance of the assertion being untrue, although they may have been of opinion from facts within their own knowledge, and from the import of the publication itself, that the defendants had only repeated that which had been publicly rumoured, believing it to be true at the time when they published it. It was laid down to the jury as a presumption of law, that malice was to be inferred from the mere fact of publication, whereas that is only one of the circumstances from which they may be warranted in drawing a conclusion of fact. The question of malice is in all cases a question of fact, to be collected from the evidence before the jury. [BAYLEY, J. I take the law to be, that where a particular consequence necessarily results from any act, the party doing the act is to be considered as *prima facie* intending the necessary consequence of that act. Thus in *Rex v. Farrington*, M. 1811, the indictment was for setting fire to a mill, with intent to injure the occupiers thereof. The indictment was not preferred until above eighteen months after the offence was committed, so that it could not be supported on the 9 G. 3, c. 29. The prisoner was of weak intellects, but not in such a state as to be entitled to an acquittal for want of reason. A point reserved was, whether, under 43 G. 3, c. 58, it was not necessary to give some evidence of an intent to injure, beyond the mere act of setting fire; but the judges were unanimous that the prisoner must be taken to have intended that which was the necessary consequence of his act, and the conviction was held right. In *Rex v. Mazagora*, Easter, 1815,^a the indictment was for disposing of forged bank notes, the intent was charged to be to defraud the bank. The jury found the prisoner guilty, but that the intent was, to defraud any person who might take the notes; and that the intention of defrauding the bank in particular did not enter into the prisoner's contemplation. On case, the judges thought the matter too clear for discussion, and that the prisoner must be taken to have intended to defraud the bank, and that the conviction was right.]

^a) The learned judge read both these cases from a manuscript. The first of them is to be found in 2 Russell, 1675, and the other in Bayley on Bills of Exchange, 443.

Eldridge v. Knott, Cowper, 215, and *Doe dem. Fenwick v. Reed*, 5 B. & A. 232, are authorities to show that the presumption of title from length of possession is a question of fact for the jury. Besides here, too, it was laid down, that the malicious intention was to be inferred unless the contrary was proved; and that the onus of proving the contrary lay upon the defendant. Now, the jury may have been led to believe that it was necessary for the defendant to produce oral or documentary proof to rebut the presumption of malice; and if they so understood it, they might thereby be induced to convict the defendants, although from facts within their own knowledge, and from the publication itself, they may have been of opinion that the defendants published it *bonâ fide*, believing the facts stated to be true.

BAYLEY, J. It appears to me, that this case was properly presented to the consideration of the jury in the first instance; and that the answer given by my lord chief justice to the question put to him by the jury was perfectly correct. Assuming it to be a question of fact whether the jury were to infer malice or not, the evidence upon that point was all one way; and that being so, it was the duty of the jury to act upon that evidence *and find the defendants [*263 guilty. It is impossible to form an accurate judgment of the direction to the jury, without adverting to the terms of the libel itself. It contains not merely an assertion of a fact which a party may suppose to be true, and with respect to which he assumes to have had only ordinary means of knowledge; but it is such an assertion, that if it were a *bonâ fide* assertion, the means of proving it to be so must be within the writer's own power. He does not merely say that such a fact exists, but he assumes to speak from authority. It is conceded, that to state falsely of his majesty that which is stated in this publication is a libel. If it be not so, the objection will be upon the record, and may be taken advantage of either upon writ of error or by a motion in arrest of judgment. But, as at present advised, I am of opinion that falsely making that assertion was evidence that the party made it maliciously. A distinction has been made between an untrue and a false assertion, and it has been argued, that if a party assert a particular fact, believing that the fact exists when it does not, although that be an untrue assertion, yet there is no criminality in it; but that if he assert that which he knows to be untrue, that is a criminal untruth or a falsehood. Assuming that that is a well-founded distinction, I think that if a party knowing a fact not to be true, or not having the means of knowing whether it be true or not, takes upon himself to assert that it is so, then he makes a false assertion, or is guilty of a criminal untruth, if it turns out that his assertion is unfounded. In the one case the criminality consists in asserting that which he knows not to be true; in the other he is making an assertion unwarrantably, when he does not know whether it be true or not. There are authorities to show, that *if a man will take upon himself to swear to a thing when he does not know whether it be true or false, he is liable to be indicted for [*264 perjury, if his testimony prove to be false. Now is the assertion in this case to be considered false or not, in the latter sense of the word? A party making such an assertion may or may not have the means of knowing the state of his majesty's health; but here, the writer takes upon himself to state that he has authority for stating such and such facts. Now, if he had such authority, he had the means of proving it to the jury, and of showing that the character of untruth belonged to it only, and not that of falsehood or criminal untruth; but inasmuch as he has not shown that he had any authority for stating the fact, it must be taken that he had none, and that it was a false assertion which disposes of one ground upon which this motion was made. Then the other question arises, whether the defendant is to be considered as having published the libel with a malicious intention. Assuming malice to be necessary in all cases to constitute a libel, I take it to be established by many authorities, to some of which I have referred in the course of the argument, that a party

must be considered, in point of law, to intend that which is the necessary or natural consequence of that which he does. If I utter defamatory language of a particular person, the presumption is, that I mean to do him a mischief. My assertion of a fact defamatory with regard to him, will materially prejudice him in the eyes of all the persons who hear or read what is said of him. *The King v. Creevey*, 1 M. & S. 273, is a strong authority *to show that the answer given by my lord chief justice to the question put by the jury was perfectly correct. That was an indictment against the defendant for publishing a libel of one Kirkpatrick, an inspector of taxes. The libel purported to be an account of a speech delivered by the defendant in the house of commons, but it was published by him as a correct report of such speech. It was objected at the trial, that there was not any proof of malice, so as to make the publication libellous. The case was tried before Mr. Justice L^E BLANC, a man of great talent, accuracy, and firmness: and he was of opinion, that it was not necessary to prove malice, but that it might be inferred from the publication itself, and he told the jury that they were to look both to the matter and the manner of the publication, in order to decide whether it was libellous or not. The defendant having been found guilty, a motion was made for a new trial. The rule was refused, and Lord ELLENBOROUGH says, "The only question is, whether the occasion of the publication rebuts the inference of malice arising from it;" and L^E BLANC, Justice, stated, "that he had told the jury to consider whether the publication tended to defame the prosecutor, giving his opinion that it did, but still leaving the question to them; and he further stated to them that where the publication is defamatory the law infers malice, unless any thing can be drawn from the circumstances of the publication to rebut that inference." I cannot distinguish that case from the present. Here, the publication was of a matter which, if false, it is now conceded was libellous. Now this decision says, that malice ought to be inferred from the publication of defamatory matter, unless some excuse for the publication be shown. The onus, therefore, of negating *malice is properly cast upon the defendant; for where the natural inference from the publication is that it is malicious, the party seeking to exempt himself from such natural inference, must do it by showing something to rebut the inference, otherwise arising from his act. Here, the defendant might have adduced evidence for that purpose; he might have shown what his authority was. In the absence of any such evidence, I think the intention was naturally and properly to be drawn from the libel itself, and, consequently, that there is no foundation whatever for disturbing the verdict.

HOLROYD, J. I am of the same opinion. This is a charge for a publication of a libellous nature, and of a description not only injurious to the individual to whom it relates, but mischievous to the public, inasmuch as it was calculated to excite great alarm in the minds of the people, as to the state of his majesty's health. Now, if a thing in itself mischievous to the public be wrongfully done, that is an indictable offence. It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse is indictable. In some cases, as in that of murder, malice is the very gist of the offence, but in larceny malice is not an ingredient. In this case, the act done was mischievous to the public. It appears, therefore, that it was not absolutely essential to aver malice in this indictment, or to prove it at the trial; but it is unnecessary to discuss that point, because I think, that, upon the rules and principles of the common law, malice was to be inferred from the evidence laid before the jury, and the jury were bound, in the discharge of their duty, to act upon those rules and principles, and to apply the law to the facts before them. *The publication in this case assumes the knowledge of the fact which it alleges. It states that the writer had it from authority, and whatever may be the import of that word, if there was any authority to justify or excuse the publication, it ought to have been shown by the defendant. For if the mat-

ter published was in itself mischievous to the public, the very act of publishing is *prima facie* evidence to show that it was done *malò animo*; for when a publication having such an injurious tendency is proved, it is intended to have been done with a malicious intention; because the principle of law is, that a party must always be taken to intend those things and those effects which naturally grow out of the act done. If, therefore, the effects naturally flowing from the act of publishing the libellous matter in this case were mischievous to the public, it follows, that the judge was bound to tell the jury that malice was, by law, to be inferred; and that that having been proved, which, according to the principles of law, made the inference of malice necessary, the onus of rebutting that inference was cast upon the defendant. It is said, however, that my lord chief justice was bound to answer the abstract question put by the jury, but I am of opinion that a judge is not bound to answer any question, except so far as it is material to the matter which the jury have to decide; and in this case if the jury were satisfied from the answer given, that it was to be presumed that the defendant intended the consequences which would naturally follow from his act, they must at the same time have been satisfied there was sufficient proof of malice, and therefore there can be no ground for disturbing the verdict.

*BEST, J. The paper set forth in this information is most correctly [268 called by it a false, scandalous, and malicious libel. We have been told by the defendant's counsel, that malice is the gist of this prosecution. I accede to this, but we must settle what is meant by the term malice. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred or ill-will to an individual but means any wicked or mischievous intention of the mind. Thus, in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary, in support of such an indictment, to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable or excusable cause. Malice, in the law relative to libels, means legal malice. The only question which the jury had to decide was, whether a paper which falsely represented that the sovereign of the country was insane and, so, incapable of discharging the duties of his office, was a mischievous paper: no men, whose minds were not disordered, could hesitate how to decide such a question. It is not possible to imagine any publication more calculated to produce irritation and disorder throughout the country, and the publishers must be taken, according to legal reasons, to have intended to produce those consequences which it was calculated to produce. The defendants were not charged with a libel published from motives of personal hatred to the king, but with a false report of the state *of his majesty's mind, made with a view to disturb the peace of the [269 country. It was admitted at the trial that the libel was false, but it was at the same time insisted, that the defendants, at the time when they published it, did not know that it was false. They say they publish from authority, and thereby undertake to be responsible for its truth. But whether a publication be true or false is not the subject of inquiry in the trial of an information for a libel; but whether it be a mischievous or innocent paper. In the position in which this case now stands it is not necessary to decide whether the defendants would have been justified had the statement been true. But it must not be taken for granted that if such a dreadful affliction had happened to the country, as the insanity of the king, the editor of a newspaper would be justified in publishing an account of it at any time, and in any manner that he thought proper. It is fit the time and mode of such a communication should be determined on by those who are best able to provide against the effects of the agitation of public feeling which it is likely to produce. A reasonable time should be left to the constituted authorities to give the nation such afflicting intelligence. Dur-

ing that time decency requires that all other persons should be silent. If such a communication should be improperly delayed, the fair liberty of the press would allow any person to call the attention of the nation to the circumstance. But such a communication, rashly made, although true, might raise an inference of mischievous intention, for truth may be published maliciously.

ABBOTT, C. J. My learned brothers having delivered their opinion, that nothing which fell from me, in my *address to the jury, furnishes sufficient *270] ground for granting a new trial, it is perhaps unnecessary for me to say any thing; I cannot, however, forbear making one or two observations. If it be true that a malicious intention be necessary to render amenable to the law a person who publishes defamatory matter,—I say that unless that malicious intent may be inferred from the publication of the slander itself, in a case where no evidence is given to rebut that inference, the reputation of all his majesty's subjects, high and low, would be left without that protection which the law ought to extend to them. I will say further, with regard to the particular expression contained in this publication, that if any writer thinks proper to say, that he speaks from authority, when he informs his readers of a particular fact, and it shall turn out that the fact so asserted is untrue, I am of opinion, that he who makes the assertion in such a form, may be justly said to make a false assertion. I am not a sufficient casuist to say, that to call it an untrue assertion would be a more proper mode of expression.

Rule refused.

*271] *ASTLE and Another v. THOMAS and BALDWIN.

In the parish of A., two churchwardens were elected for the township of B., and two others for the rest of the parish. Separate rates were made for these divisions: *Held*, that the churchwardens elected for the township of B. might maintain an action against their predecessors for money remaining in their hands, and were not bound to make all the present or late churchwardens of the parish plaintiffs or defendants.

ASSUMPSIT by the plaintiffs, churchwardens of the township of Burton-upon-Trent, in the parish of Burton-upon-Trent, against the defendants, late churchwardens of the same township, for money had and received, to the use of the plaintiffs, as churchwardens as aforesaid. Plea, by Thomas, the general issue; by Baldwin, that two other persons, J. T. and J. H., should have been sued together with him and Thomas. Issue thereon. At the trial before PARK, J., at the last assizes for the county of Stafford, it appeared that the parish of Burton-upon-Trent consists of the township of Burton-upon-Trent, for which two churchwardens have always been appointed; and also of several country hamlets, which have jointly appointed two other churchwardens. There is only one parish-church in the parish, and that is situate in the township of B. Separate rates have always been made by the two sets of churchwardens. When the defendants went out of office the sum of 18*l.* remained in their hands. J. T. and J. H. were churchwardens for the country hamlets, when the defendants were churchwardens for the township of Burton. For the defendants it was objected, that the whole body of churchwardens appointed for the parish formed but one corporate body, and that the action should have been brought by all the present against all the late churchwardens. The learned judge overruled the objection, and the plaintiffs had a verdict for 18*l.*

*272] *Campbell now moved for a new trial, and relied on the objection before mentioned. It is true, that in this parish no common fund was raised. The churchwardens appointed by the township of Burton, and those for the country hamlets made separate rates for their divisions respectively. But *Rex v. Gordon*, 1 B. & A. 524, shows that there must be one rate for the whole parish, and that separate rates, by separate bodies of churchwardens, cannot legally be made. [BAYLEY, J. The rate there in question was a poor-

rate, between which and the present there is this material distinction: there may be an immemorial custom as to a church-rate, but not as to poor-rates, which had no existence before the reign of Eliz.] At all events the appointment of churchwardens cannot be for a township, it must be for a parish; if, therefore, the plaintiffs were sworn in, and acted for the township of Burton-upon-Trent, they were not legal officers, and if they were appointed for the whole parish, the whole body of churchwardens should have joined in the action, therefore, quacunque viâ, the defendants are entitled to a new trial.

ABBOTT, C. J. I think we are not called upon to inquire whether the appointment of the plaintiffs was or was not strictly legal, we must presume it to have been legal. The material part of the case is, that in this parish there were two purses, supplied by separate rates, one upon the township of Burton, the other on the country hamlets. It is no injury to the parish at large, that the money in question has not been paid over, but only to that part of it from which, and for the use of which it was raised. I am, therefore, of opinion, that the plaintiffs being invested with a right to the management of that sum, [*273 are entitled to maintain an action for it.

Rule refused.

COLLEY and Another v. STREETON and Others.

Where a tenant occupied, under an agreement containing a variety of provisions, and amongst others, that he should keep the premises in tenantable repair: *Held*, that the landlord might declare generally, "that the defendant became tenant, and in consideration thereof undertook to repair," without setting out the agreement. Where A. held premises under a lease containing a clause of re-entry for want of repairs, and afterwards underlet a part to B., who undertook to repair within three months after notice for that purpose; the premises underlet being out of repair, A.'s landlord threatened to insist upon the forfeiture if they were not repaired, and A. gave notice to B. to repair. The premises at the expiration of three months from that time remaining out of repair, A. entered and repaired: *Held*, that he might recover from B. the sum expended on that occasion. After the repairs were done by A., but before the commencement of the action, B. sold his interest in the premises to a person who pulled down and entirely rebuilt them: *Held*, that this did not deprive A. of his right to recover the whole sum expended by him.

ASSUMPSIT on a special agreement. The declaration stated, that by a certain memorandum of agreement, sealed with the seals of the defendants, made July 25th, 1816, between plaintiffs of the one part, and defendants, described as assignees of one S. Crane, a bankrupt, of the other part; reciting, that by an agreement, under the hand of J. Peacock of the one part, and S. Crane of the other part, bearing date March 29th, 1796, J. Peacock agreed to let unto S. Crane, and S. Crane agreed to take and rent of J. Peacock, certain premises therein mentioned, for thirty-four years, at the yearly rent of 40*l.*; and that S. Crane thereby agreed to keep the same in good and tenantable repair, during the said term, and that Peacock thereby agreed to grant a lease on those terms to Crane, with usual covenants, within three calendar months, and that Crane agreed to execute a counterpart thereof; reciting also, that Peacock procured a lease to be granted to him of the said premises, together with others, [*274 by one indenture, dated the 21st January, 1802, for a longer term than that by him agreed to be granted as aforesaid; reciting also, that Peacock afterwards granted an under-lease of all the said premises, for nearly the whole of his term therein, unto J. S. and J. J., subject to the said agreement with S. Crane, and that the same under-lease was then effectually vested in the plaintiffs; reciting also, that defendants, as assignees as aforesaid, were entitled to the benefit of the said agreement entered into with Crane: the said plaintiffs did agree with the defendants, that they would, on or before the 9th of September then next, demise and lease unto defendants all the premises, by the said agreement of the 29th of March, 1796, agreed to be demised, for the residue which should then be to come of the said term of thirty-four years; and the defendants

did thereby agree that they would accept such lease, and execute a counterpart: and it was mutually agreed, that in the said lease there should be a covenant, that the lessees should pay the rent, and keep and preserve the premises in sufficient and tenantable repair; and that it should be lawful for the plaintiffs to enter and view the same, during the continuance of the said term, and of all want of repair give notice at the premises; and that the lessees would make good the same, within three calendar months after such notice; and there was to be a clause of re-entry for breach of any of the covenants in such lease. And thereupon, afterwards, in consideration that the plaintiffs would permit and suffer the defendant to hold and enjoy the premises before such lease should be made, upon the terms which, by the said memorandum of agreement were to be contained in such lease, defendants undertook to do and perform all such

*275] "things as it was agreed that there should be covenants for the lessees to do and perform. Averment, that plaintiffs did, before any lease was made, viz., from the day and year first mentioned, until the commencement of the action, suffer the defendants to occupy as aforesaid, yet the defendants, during all that time, suffered the premises to be out of repair; that plaintiffs entered and viewed the premises, and on 17th of October, in the year first aforesaid, gave the defendants notice of the want of repair, but that they did not repair within three calendar months, by reason whereof plaintiffs were obliged to lay out a large sum of money in repairing the premises. Second count, that on, &c., in consideration that defendants, at their request, had, before that time, become, and then were, tenants to plaintiffs of certain premises, they undertook to keep the same in good and tenantable repair; that they did not do so, whereby plaintiffs were obliged to lay out a large sum of money in repairs. Third count, same in substance; and common money counts. Plea, general issue. At the trial before ABBOTT, C. J., at the London sittings before this term, the plaintiffs gave in evidence the agreement set out in the first count of the declaration. Whereupon it was objected for the defendants, that the instrument therein recited, bearing date March, 1796, was a lease to Crane, and that there being a subsisting lease at the time when the new agreement was made with the defendants, the consideration for the promise laid in the first count was incorrectly stated; the action should have been founded on the original lease. The lord chief justice observed, that it was immaterial whether the instrument were or were not a lease, as the second and third counts stated that defendants had become tenants to the plaintiffs.

*276] "The plaintiffs then proved a lease to Peacock, with a covenant by him to repair, and a clause of re-entry for any breach of covenant, and an under-lease, with like covenants granted by him, which afterwards became vested in the plaintiffs; they then proved that their superior landlord, on the 28th of September, 1816, gave them notice to repair the premises in question, which were out of repair; and that on the 17th of October following, they served on defendants' solicitor notice to repair. The defendants said they were about to sell the premises, and begged that they might not be then compelled to repair. No repairs were done by them, nor were the premises sold. Plaintiffs frequently, afterwards, applied to them to repair, and said that if it was not done they would send workmen to do it; and on the 19th of March, 1817, the plaintiffs sent workmen, who repaired the premises at an expense of 228*l.*, doing no more than was necessary to put them in tenantable repair. No express assent by the defendants was proved; but some evidence was given to show that they knew what was going on, and did not dissent until after the sum above mentioned had been expended. The defendants afterwards sold the premises to a purchaser, who pulled down the old buildings and entirely rebuilt them, before the commencement of this action. The lord chief justice left it to the jury to say, whether the sum expended was a reasonable sum for putting the premises in repair; and observed, that the plaintiffs had a right to have the premises in repair at all

times during the lease; and that the subsequent rebuilding of the premises did not deprive them of a right to recover such sum as had been reasonably expended. The jury found a verdict for the plaintiffs for the whole sum expended by them.

**Wilde* now moved for a new trial, on the ground of a variance between the declaration and the evidence, and on the ground of a misdirection by the lord chief justice as to the quantum of damages. This was an action founded on an implied contract to repair the premises which the defendants occupied; the first count set out an agreement to grant a lease, and alleged that the defendants agreed to occupy according to the terms of that agreement until the lease should be executed. The second and third counts stated that a tenancy existed. Now, if the instrument of 1796 between those under whom the plaintiffs claim and the defendants was a lease, it was still subsisting when the new agreement was entered into in 1816, and consequently the parties occupied under the first, and not under the second agreement; so that the consideration laid for the promise in the first count fails. The principle upon which to decide whether any instrument be or be not a lease, is clearly laid down in *Bac. Abr. Lease* (K). "Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time; such words, whether they run in the form of license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years." [ABBOTT, C. J. Supposing it to be a lease, and that the first count was not proved, what objection is there to the second and third?] They are both framed on an implied promise, arising out of the tenancy; whereas the promise was express, and contained in an instrument containing a variety of provisions, the whole of which, taken together, formed the consideration of the promise; the whole, therefore, should have been set out in those counts. [ABBOTT, C. J. The instrument which you mention was not under seal; it was merely evidence of a continuing promise by the person coming into possession, to perform the contract with the person who might happen to be the owner of the premises.—*HOLROYD, J.* If the defendants were occupying under the terms of the original agreement, they were bound to perform the terms of it; nor was it necessary to set out the whole of it. The obligation to repair arises out of the tenancy: the agreement showing a tenancy was evidence to prove the promise as laid; for, by law, the defendants as tenants were bound to keep the premises in repair.] Then, secondly, the question of damages was not correctly left to the jury. The premises were actually rebuilt before the action was commenced; under such circumstances, the plaintiffs could not have claimed more than nominal damages if they had not laid out their money in the repairs. But as there was not any evidence to show that the repairs were done with the assent of the defendants, (and without such assent the plaintiffs had no right to enter for the purpose of doing them,) they ought not to be prejudiced by that circumstance. Suppose, instead of repairing the premises themselves, the plaintiffs had brought an action against the defendants for suffering them to be out of repair, and at the trial it had been proved that before the action was brought they had been completely repaired, surely nominal damages only could have been recovered.

ABBOTT, C. J. It appeared at the trial that the plaintiffs held the premises in question, together with others, under a lease. Part of those premises was let to the defendants. The superior landlord of the whole required the plaintiffs to repair that part which was in the occupation of the defendants, under a threat of an ejectment. *In October, 1816, notice to repair was given to the defendants, but they did not repair. The premises were at that time unoccupied; the defendants had put them up to sale by auction and bought them in, but were about to make another attempt to dispose of them. Application was then made to the attorney for the defendants, who said that they wished the landlord to suffer the premises to remain unrepaired until after the

sale. The plaintiffs then gave notice, that if the necessary repairs were not done by a certain day, they would order them to be done. Under these circumstances the plaintiffs did repair at a certain expense, which, at the trial, was proved to be a fair and reasonable sum to be expended in such repairs. I told the jury that it was quite immaterial whether the action was founded on the instrument executed in 1796, or on that of 1816, because in each there was a stipulation to repair; and further, that it was not necessary for the plaintiffs to prove that the defendants assented to the repairs being done by them, because if there was no such assent, the plaintiffs would be trespassers, and liable to an action for the entry. I observed to them, that the plaintiffs were under an obligation to repair in order to preserve their own estate; and further, that as landlords, they had a right to have the estate at all times in good repair, for otherwise their reversion would be lessened in value; and I left it to them to decide whether the sum expended was or was not reasonable. They found that it was, and I cannot say that I am by any means dissatisfied with that finding.

BAYLEY, J. I think that this case is free from all doubt; the defendants held the premises under an obligation to repair, which they did not perform. The
 *280] *measure of the damages was properly the loss which the plaintiffs sustained, by reason of the default of the defendants. That was the sum reasonably expended by them in doing such repairs as were necessary for the purpose of avoiding a forfeiture of the lease, which they had of these, together with other premises.

HOLROYD, J. I am of opinion that there is not any ground for a new trial in this case. The plaintiffs are entitled to retain the verdict for the damages given. It is clear that they sustained a loss to that amount, in repairing the premises which the defendants ought to have repaired. Assuming that the landlords lawfully entered and repaired, this is quite clear, for the subsequent rebuilding was no remuneration to them. It is argued, however, that the plaintiffs had not any right to enter; but I think that they had, on the ground that they were liable to repair, and that the want of repair by the defendants was a forfeiture for which they might enter, under the provision in the agreement, that there should be a clause of re-entry for breach of any covenant in the lease contracted for, although they may be considered as having subsequently waived the forfeiture. But whatever may be the law as to that point, the plaintiffs are, at all events, only liable to an action of trespass for the entry, and may notwithstanding recover the money which they expended. This would have been quite clear, if the premises had not been afterwards pulled down and rebuilt; and I cannot see how that circumstance lessens the damages which had been then already sustained.

BEST, J., concurred.

Rule refused

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*WARREN v. HOWE.

An assignment by indenture of a judgment debt is not an assignment of property within the meaning of the 55 G. 3, c. 184, sch. part. I., tit. *Conveyance*, and does not therefore require an ad valorem stamp; but must have the ordinary deed-stamp.

COVENANT on an indenture: *Plea*, non est factum. At the trial before ABBOTT, C. J., at the London sittings after last term, the deed was produced in evidence; and it recited, that the defendant being indebted to the plaintiff in the sum of 50*l.* 5*s.*, and being unable to pay, had requested the plaintiff to take an assignment of a judgment against one Morgan for 168*l.*, in order to secure to the plaintiff the payment of his debt; and that he assigned the judgment to the plaintiff, to secure him the payment of 50*l.* 5*s.* upon trust in the first place, out of the moneys to be recovered on such judgment, to pay the expenses of the assignment, and all necessary expenses in enforcing payment of the judgment not exceeding 30*l.*; and in the next place to pay himself the 50*l.* 5*s.*, and then

to pay the residue to the defendant. The deed had an ad valorem stamp of 1*l.* 10*s.* It was objected that it ought to have had the common deed-stamp of 1*l.* 15*s.*; and the lord chief justice being of this opinion, nonsuited the plaintiff, but reserved to him liberty to enter a verdict for 50*l.* 5*s.*, if the court should be of opinion that the deed was duly stamped.

Jeremy now moved accordingly. The deed was properly stamped. By the 55 G. 3, c. 184, sched. part I., tit. *Conveyance*, a stamp of 1*l.* 10*s.* is required upon the sale of a right, title, interest, or claim, into, out of, or upon any lands, tenements, rents, annuities, or other property where the consideration-money amounts to 50*l.*, and *does not exceed 150*l.* Now, the assignment of [*282 a judgment-debt is an assignment of a right to property within the meaning of that clause. It is clear that a *chase* in action may be assigned for a just debt, Vin. Abr. *Assignment*, D, and that a debt upon a judgment may be assigned, Littleton's Rep. 116; and, although in such cases, actions must be brought in the name of the assignor, still the assignee has a property in the right assigned; and that was so considered by BULLER, J., in *Master v. Miller*, 4 T. R. 340. It is true, that the court of common pleas in *Coats v. Perry*, 6 B. Moore, 188, were of opinion, that a deed of assignment of property to trustees in trust to sell, was not a conveyance within the meaning of this clause, on the ground that it applied only to actual sales between vendor and vendee; but here there was an actual transfer of the assignor's right to the amount of the debt to the assignee. Secondly, if it does not fall within this clause it is a conveyance of property in trust for sale, intended only as a security for money; and for the duty imposed upon such a deed, the schedule refers to title Mortgage, and by that the duty of 1*l.* 10*s.* is required in cases where the same is intended as a security for the payment of a sum exceeding 50*l.*, and not exceeding 100*l.* In the deed in question, it was expressly stated that the assignment was made "for the better securing" the repayment of the debt due, and upon certain trusts to effect that object; it seemed, therefore, to fall directly within the provision of that title of the act, and if so, that stamp was sufficient.

ABBOTT, C. J. It happens in this case that the ad valorem duty is less than that which would have been payable in respect of the common deed-stamp, but in *most cases the former duty is higher. Whether this clause of the sta- [*283 tute requiring the ad valorem duty be cumulative or not, it is unnecessary to decide in this case, for we are all of opinion that a judgment-debt is not property within the meaning of the clause. The words are, "conveyance of any right, title, interest, or claim to any lands, tenements, rents, annuities, or other property, for or in respect of the deed, whereby the lands or other things sold shall be conveyed to the purchaser." The statute enumerates things which are the subject of sale, and which are usually converted into money; and I think that the expression, other property, applies only to property of the same description as that previously mentioned, viz., such property as is usually the subject of sale and may be converted into money. Now, a judgment-debt is not a property of that description. It clearly does not fall within the other clause which has been adverted to, because it is not a conveyance of property in trust for sale.

Rule refused.

BLIZARD v. KELLY.

A count in slander, charging that defendant had imposed upon the plaintiff the crime of felony, is good after verdict. (a)

ACTION for slander. One count charged that the defendant had wrongfully, and without reasonable or probable cause, imposed the crime of felony upon the plaintiff. Plea, not guilty. At the trial before PARK, J., at the last assizes for the county of Gloucester, the plaintiff obtained a general verdict with 200*l.*

(a) See Comyns' Dig., tit. *Action on the case for Defamation*, D. 4, and 1 Ventris. 264.

damages. *Tumton* now moved to arrest the judgment, on the ground that the count which stated that the defendant had imposed upon the plaintiff the crime of felony, was bad. Those words had no specific meaning. If the plaintiff recovered damages upon that count, he might afterwards bring an action for the specific words used, and the judgment obtained in this action could not be pleaded in bar. *Cook v. Cox*, 3 M. & S. 110, is an authority to show that the words themselves ought to be set out in the declaration, and that a count containing such a general charge is bad, even after verdict. In *Pippett v. Hearn*, 5 B. & A. 634, although it was held that a count charging generally, that the defendant had maliciously indicted the plaintiff for wilful and corrupt perjury was good after verdict, yet a distinction was there taken between felony, which embraced a variety of charges, and perjury, which was one distinct crime.

R. Bayly, amicus curiæ, stated, that he had for many years in his precedent-book a form of such a count, and a manuscript note of a case taken by the late Lord Chief Justice Gibbs, in which such a count was held good after verdict; and *Starkie*, amicus curiæ, referred the court to *Davis v. Noakes*, 1 Stark. 377.

Assort, C. J. This form of count is very ancient. The words in present use are a bad translation of the Latin words, "crimen felonix impositum." The legal sense and meaning of those words is, that the party made the charge of felony before a magistrate. It is not sufficient, in support of such a count, to prove that the plaintiff was charged with felony in conversation. It can only be sustained by proof, that the defendant went before a magistrate and charged the plaintiff with felony. *The objection taken to such a count, that it does not specify the particular felony with which the party was charged, is not valid after verdict.

Rule refused.(a)

(a) The following case is taken from Lord Chief Justice Gibbs's MS. Note Book.

COLEMAN v. GOODWIN, B. R., Easter, 1782.

Case for slander. The declaration consisted of nine counts. The first stated that before, &c., one J. H. lived at Bristol; that said J. H. before, &c., and whilst he lived at Bristol, had been, and was suspected, and publicly accused and charged with having been guilty of sodomitical practices. That defendant, in a discourse concerning plaintiff, and concerning said J. H., and concerning sodomy and sodomitical practices, spoke, &c. The six next counts charged different sets of words. The eighth repeated the same colloquium; and the words laid were, "I have known him to stay all night at H.'s;" meaning, &c., to insinuate that plaintiff had been concerned in, and had been guilty of sodomitical practices with said H. The ninth charged that defendant had imposed the crime of having been guilty of sodomitical practices on the plaintiff.

Verdict for plaintiff, damages 500*l*. The verdict was general.

Wallace and *Beacraft* contended, in arrest of judgment, that the last two counts were bad. They objected to the eighth, that the words were clear in their meaning, and innocent, and that an innuendo may fix the doubtful or ambiguous meaning of words, but cannot annex a sense totally collateral; 4 Co. 17: and to the ninth they objected, that sodomitical practices was no specific charge; *Sayer's case*, M. T. 18 G. 3, where the court said they knew what treason was, but not what treasonable practices meant.(a)

Solicitor-General (Lee), *Wilson*, and *Pigott*, contra, said the old doctrine of words was now exploded, and it was fully settled that their meaning was a fact to be left to the jury.

Lord Mansfield. It is much to be lamented that, upon a general verdict, the court cannot give judgment if any one count is bad.

It is objected that the last count contains no description of any crime known in law. That is not necessary. It charges it in the vulgar language, which is sufficient.

Next, it is said that the words in the eighth count are not sufficient, &c. What do these words signify? Can any one doubt? The meaning of all words depends on the subject-matter. It is for the determination of the jury, and was left to them.

**ASHURST*, J. The effect of the words on the hearer is what is to be considered. The old cases are a diagraph to the law.

BULLER, J. How this would rest upon the bare innuendo, might be doubtful; but with the colloquium there can be no doubt. The question is, whether these words, by any construction, can mean to impute sodomy. They certainly can, and it is found they do. The reason for arresting judgments upon general verdicts in civil cases is because the court cannot tell how to apportion the damages. In indictments it is sufficient, because it appears that the defendant has been guilty of a crime for which he is to suffer.

(a) Reported 2 W. Bl. 1165, but the dictum here cited is not in the printed report.

As to the last count, *words* will not support such a count. It is understood to mean an accusation before a magistrate; but in such an accusation it is not necessary to use the words of a legal charge; that is made out afterwards by the evidence.

Rule discharged.

The KING v. The Justices of the North Riding of YORKSHIRE.

Prisoners committed to jail for trial, who are able, but refuse to work, are not entitled by law to have any food provided for them by the public; and therefore where a magistrate reported, as an abuse, to the justices at the quarter sessions, that untried prisoners had been compelled to work at the tread-mill, and the justices at sessions ordered that the tread-mill should be applied to the employment of other prisoners as well as those sentenced to hard labour; and that those committed for trial who were able to work, and had the means of employment offered them by which they might earn their support, but who refused to work, should be allowed bread and water only, this court refused to grant a mandamus to compel the justices to order such prisoners any other food.

M. STAPYLTON, Esquire, a magistrate for the North Riding of Yorkshire, in his official capacity, visited the house of correction at Northallerton, on the 14th October, 1823, and found that several prisoners committed for trial had been compelled to work upon the tread-mill, against their inclinations. On the same day he made his report in writing to the justices, in general quarter sessions assembled, of this state of facts, and required the same to be taken into immediate consideration, and rectified. The sessions took the report into consideration, and made an order that the tread-mill should be applicable, both as hard labour, in the *cases of such prisoners as might be sentenced thereto, and for [*287 the employment of other prisoners; and also, that persons committed for trial, who were able to work, and had the means of employment offered them, by which they might earn their support, but who should obstinately refuse to work, should be allowed bread and water only. Upon an affidavit disclosing these facts, and the belief of Mr. Stapylton that bread and water, unaccompanied by any other article of food, does not afford sufficient nourishment for the due support of human nature, and that upon such a diet the health of prisoners cannot be preserved,

Scarlett (and *Alexander* was with him) moved for a mandamus to the justices of the peace for the North Riding of Yorkshire, commanding them to inquire into and rectify this abuse. By stat. 4 G. 4, c. 64, s. 17, "any justice is empowered to enter into and examine the state of any jail, as often as he shall think fit, and is required to report, in writing, any abuse therein, to the next quarter sessions; which abuse, so reported, shall be taken into immediate consideration, by the justices at such sessions, and the most effectual measures adopted for inquiring into and rectifying such abuse, as soon as the nature of the case will allow." Now, if this court see that the justices have not complied with the directions of that section, in rectifying the abuse presented, it will, by mandamus, compel them so to do. By section 10, certain regulations are prescribed for the management of prisons; and by the thirteenth regulation it is provided, that "every prisoner maintained at the expense of any county, &c., shall be allowed a sufficient quantity of plain and wholesome food, to be *regulated by the ses- [*288 sions; regard being had (so far as may relate to convicted prisoners) to the nature of the labour required from, or performed by such prisoners, so that the allowance of food may be duly apportioned thereto: and the justices may order for such prisoners of every description as are not able to work, or being able, cannot procure employment sufficient to sustain themselves by their industry, or who may not be otherwise provided for, such allowance of food as the justices shall think necessary for the support of health." Then section 37, reciting that "persons are often committed to prison for trial, who are willing to be employed in such work as can be conveniently executed in the prison to which they are so committed, and it is fit that such persons should be so employed rather than that they should be obliged to remain idle during their confinement," enacts, that any visiting justice may authorize, by an order in writing, the em-

ployment of any such prisoners, with their own consent, in any such work ; and that the keeper of such prison is to employ such prisoners in such work or labour accordingly, and is to pay to such prisoners any such wages, or portion of the same, and at such periods as shall be directed by such justice." From these two sections it is obvious that such prisoners committed for trial, as have not the means of supporting themselves, and are, consequently, maintainable by the riding, are entitled to a sufficiency of plain and wholesome food ; and that the magistrates have no authority to compel such prisoners to work at the treadmill, or at any other species of employment against their inclinations. Now the order of the justices, made subsequently to the reported abuse, is in direct *289] contravention of this act of parliament. The effect of that order is *to compel the untried prisoners to work against their will ; for if they do not work at the employment prescribed, they will have no other allowance than bread and water. That, too, cannot be considered "plain and wholesome food," within the meaning of the tenth section. Such food must necessarily be of a description adequate to the due preservation of health ; yet that is negatived by the affidavit. It is true, that no individual case is mentioned in which the allowance of bread and water alone has had a prejudicial effect upon the health of the prisoner, but it is notorious, that many of the diseases afflicting the labouring classes, result from too spare a diet. [ABBOTT, C. J. How are we to judge what is "plain and wholesome food?" That is matter upon which the justices are exclusively to decide. Can you refer us to any act of parliament which makes it compulsory on the county to provide with food persons committed for trial?] The only statutes bearing upon that point are 19 Car. 2, c. 4 ; 31 G 3, c. 46, s. 13, and 4 G. 4, c. 64.

ABBOTT, C. J. It appears by the preamble of the 19 Car. 2, c. 4, that before that statute there was not any sufficient provision made for the relief and setting on work of poor persons committed to jail for felony and other misdemeanors, and that they actually many times perished before their trial, and that the poor, living there idle and unemployed, became debauched, and came forth instructed in the practices of thievery and lewdness ; and that statute then enabled the justices at sessions to provide a stock of materials, out of the county rate, for setting on work poor prisoners, and to bestow the profits arising from such *290] labour towards their relief. *The statute 31 G. 3, c. 46, s. 12, extends the provisions of the former statute to all prisoners whatever within the jails, who may be inclined and willing to work ; and by the recital in the thirteenth section, it appears, that even at that time the health of the prisoners was frequently so affected by want of necessary food as to render them incapable of labour when released ; and the justices at sessions are thereby authorized to order money to be paid out of the county rate towards assisting prisoners of every description who are not able to work, or who, being able, cannot obtain employment sufficient to sustain themselves by their industry. It is clear, therefore, that before the late statute prisoners who were able and unwilling to work were not entitled to be maintained at the public expense ; and it is not contended that that statute casts such a burthen upon the public. There being, therefore, no provision in any act of parliament to compel the county to provide food for those who are able but unwilling to work, we cannot grant a mandamus to compel the justices to order any species of food to be provided for such prisoners. We ought to see clearly that the magistrates have neglected some duty imposed upon them by law before we compel them to act in any particular mode. From the facts now before the court it does not appear that labour at the treadmill is a species of work unfit for the employment of the prisoners. I cannot say that such an employment is contrary to law. The legislature appears to have vested in the county magistrates a discretion as to the management and diet of the prisoners.

BAYLEY, J. I am of opinion that the public are not bound to find food for
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those who are able but who are *unwilling to work, and if that be so the justices have already done more than the law required them to do, by [*291 ordering such persons bread and water.

BEST, J.(a) I think that a writ of mandamus ought not to issue in this case, because the magistrates have already done more than we could order them to do. If the law requires a certain thing to be done, we may order it to be done by the party upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act or even consider the matter, we may compel him to put himself in motion to do the thing, but we cannot control his discretion. By the statute 4 G. 4, c. 64, s. 17, the justices at sessions are bound, upon its being reported by a magistrate that certain abuses exist in a jail, to take that report into consideration. In this case a magistrate made his report that prisoners committed for trial were compelled to work on the tread-mill. The justices at sessions took that report into consideration, and determined that the tread-mill should be applicable both as hard labour to such prisoners as were sentenced thereto, and for the employment of all other prisoners. So far they have complied with the act of parliament, by taking the matter into consideration; but it is said that they have not rectified that which is alleged to be an abuse, because they have directed the tread-mill to be used for the employment of all prisoners, and have also ordered that persons committed for trial, who are able to work, and have the means of employment offered them by the magistrates, by which they may earn their support, but who obstinately refuse to work, shall be allowed bread *and [*292 water only; and it is insisted that that is not plain and wholesome food for their support, and therefore a violation of the thirteenth regulation. It is not, however, for us to decide whether it be or be not sufficient, the quality and quantity of the food being left to the discretion of the magistrates. But what right has a prisoner to whom work is offered, and who is able to do it, but will not, to have any food at the expense of the county? According to the poor-laws, he who is able to labour is to be maintained by labour only, and nothing is to be provided for him but a means of employment. Neither humanity nor policy requires that one on whom a charge of felony has been made on oath, should be in a better situation than one who lives unsuspected of crime. The common law made no provision for maintaining prisoners in idleness. And the preamble of the 19 Car. 2, c. 4, is a legislative declaration of the mischievous consequences resulting from poor prisoners not having the means of supporting themselves by labour, and from their living in idleness, and that statute, as a remedy for this error, enacts that the justices shall provide materials for setting on such prisoners to work. The wise principle of that, as well as all other statutes for the maintenance of the poor was, that employment should be provided for them by which they might support themselves. The 4 G. 4 sanctions that principle. The thirteenth regulation enables the justices to order for such prisoners of every description as are not able to work, or being able cannot procure employment sufficient to sustain themselves by their industry, or who may not otherwise be provided for, such allowance of food as they shall think necessary for the support of health." The thirty-seventh section enables the magistrates to employ prisoners committed for trial with the *consent of such prisoners. This section prevents them from forcing such prisoners to work [*293 against their will, but it does not oblige them to find food for such as are able and will not work. An idle person has no right to the maintenance now claimed for him, and therefore we cannot order the magistrates of the county to provide better food for such prisoners than they have already offered them. I do not mean to say that magistrates in all cases would be justified in offering to such prisoners the same severe labour that persons condemned to hard labour are bound to perform. Inasmuch as the object of employment of prisoners

committed for trial is support and not punishment, it may perhaps be fit to provide the most profitable and least irksome labour which, consistently with the security of the prisoners and the situation of the jail, can be provided.

Rule refused.

DRAYTON and Another v. DALE.

Assumpsit by the endorsee against the maker of a promissory note, payable to A. B. or his order. Plea, first, non assumpsit; and, secondly, that A. B. became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to endorse the promissory note before the time of endorsement became vested in the assignees, whereby the endorsement by A. B. was void, and created no right in the plaintiffs to sue. Replication to the last plea, that the endorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record. First, because the defendant, who had made the note payable to A. B. or his order, was estopped from saying that A. B. was not competent to make an order. Secondly, because the property acquired by a bankrupt subsequently to his bankruptcy does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons.

Assumpsit by the plaintiffs, as endorsees against the defendant, as the maker of a promissory note, dated the 22d of September, 1818, for 50*l.*, for value
 *294] received, payable twenty-four months after date, to one Gauntlett Clarke, or his order, and by the said G. Clarke endorsed to Messrs. Knight and Freeman, and by them endorsed to the plaintiffs. Plea, first, general issue, and secondly, the bankruptcy of the said G. Clarke and one G. Whitehead the younger, by virtue of a commission of bankrupt dated and issued the 19th November, 1814, and an assignment thereupon by the commissioners to Messrs. Gibson, Wilson, and Howell, dated the 1st December, 1814, by reason of which and by force of the statute in such case, &c., the interest, title, and right to endorse the said promissory note in the declaration mentioned, before and at the time of the endorsement by G. Clarke, became and was vested in the said assignees, and not in the said Clarke, and thereby the endorsement of Clarke became void, and created no right in the plaintiffs to sue. The plaintiffs joined issue on the first plea and replied to the second, that after the assignment to the assignees, the endorsement of Clarke was made by him by and with the consent of the said assignees. Rejoinder denying such consent, whereupon issue was joined. At the trial, before Abbott, C. J., at the adjourned sittings at Guildhall, after Hilary term, 1821, a verdict was found for the plaintiffs for 51*l.* 10*s.*, subject to the opinion of the court upon a case which stated the issuing of the commission, and the assignment to the assignees named in the plea, and that they executed a power of attorney to Clarke to collect debts, and sue in their names, &c. At the time of the bankruptcy the defendant was indebted to Clarke's separate estate in a sum much exceeding the amount for which the promissory note was given. Wilson was the sole acting assignee, and he having
 *295] desired Clarke to proceed against the defendant for the recovery of the debt, Clarke proposed to take that debt upon his own account, and Wilson assented to that proposal. Clarke informed the defendant of this arrangement, and he gave the promissory note in question in part payment of his debt; Clarke endorsed it for a bona fide debt to Knight and Freeman, and the latter endorsed it for a valuable consideration to the plaintiffs. Neither Knight and Freeman nor the plaintiffs knew of the circumstances under which the note was given. Upon counsel being heard in a former term, the court were of opinion that there was not any evidence that the note was endorsed by Clarke with the consent of all the assignees, and they ordered the verdict to be entered for the plaintiffs on the first issue, and for the defendants on the second issue, and that the case should be submitted for argument upon the following question, whether or not

the plaintiffs were entitled to the judgment of the court upon the whole record so framed, notwithstanding the verdict found for the defendant on the special plea.

F. Pollock, for the plaintiffs. The question raised upon the pleadings is, whether the previous assent of the assignees is necessary, in order to enable a bankrupt to pass the property in a bill or note by endorsement. It is not alleged that the assignees claimed the property, but merely that the bankrupt had no title. It is clear, however, from a series of authorities, that an uncertificated bankrupt has an interest in property acquired after his bankruptcy, unless his assignees claim it. *Ashley v. Kell*, 2 Str. 1207; *Chippendale v. Tomlinson*, Cooke's B. Laws, 406, 7th ed.; *Webb v. Fox*, 7 T. R. 391; *Fowler v. Down*, 1 B. & P. 44, and *Coles v. Barrow*, 4 Taunt. 754. Besides, [*296 in this case the note was payable to the bankrupt, or his order. The defendant, by giving such a note, held out to the world that the bankrupt was capable of making an order upon the note, and, therefore, is estopped now from saying that he was not competent so to do.

Chitty, contra. The property in the note absolutely vested in the assignees, and they took that property, not as individuals, but as trustees for the creditors; and in that character they were bound to take to the property. *Nias v. Adamson*, 3 B. & A. 225, is a strong authority to show that the property actually vests in the assignees by the assignment; and *Kitchen v. Bartsch*, 7 East, 53, shows that it is immaterial whether the property came to the bankrupt before or after his bankruptcy. In that case it was argued, but without success, that the defendant, by having contracted with the bankrupt was estopped from saying that he had no title. It is true that there the assignees interfered; but *Nias v. Adamson* shows that that makes no difference. And it is clear that a bankrupt, after an act of bankruptcy, cannot pass the property in a bill by endorsement. *Thomason v. Frere*, 10 East, 418.

ABBOTT, C. J. Looking at this case as it is stated upon the record, and that is the most favourable way in which it can be considered for the defendant, I am of opinion that the plaintiffs are entitled to the judgment of *the [*297 court. The action is brought upon a promissory note, payable to Clarke or order, and endorsed by him to a third person, and by him to the plaintiffs. The defendant pleaded, first, non-assumpsit, and, secondly, the bankruptcy of Clarke on the 19th November, 1814, and an assignment by the commissioners to the assignees, on the 1st December, 1814, and that thereby the interest, title, and right to endorse the promissory note, before and at the time of the endorsement by Clarke, became vested in the assignees and not in Clarke, and the endorsement of Clarke was void, and created no right in the plaintiffs to sue. To that plea, the plaintiffs replied, that after the assignment to the assignees, the endorsement of Clarke was made by him with the consent of the assignees, and issue was taken and joined upon the fact of such consent, and the jury having found a verdict for the plaintiffs on the general issue, and for the defendant on the other issue, the question is, whether the plaintiffs be entitled to judgment, notwithstanding the verdict found for the defendant on the second issue. It must now be taken as a fact, that the endorsement was made by Clarke without the consent of the assignees, and then the question is, whether Clarke, having made such an endorsement without the previous consent of his assignees, could thereby transfer any interest in the note to his endorsee. Now, inasmuch as the note, which is a negotiable instrument, is made payable to Clarke or his order, and it is greatly to the advantage of commerce that such an instrument should be transferable by endorsement, we ought, according to the rules and principles of law, which are framed with a view to the general convenience of mankind, to give effect to the transfer of such a negotiable instrument, unless some *plain rule of law interfere to prevent it. Now is it a just conclusion of law, from the facts stated in the plea, that the right and title [*298 to endorse this note was vested absolutely in the assignees? I am of opinion

that it is not. If the right and title to the note were vested absolutely in them, it would follow as a necessary consequence, that the right and title to every other chattel acquired by an uncertificated bankrupt after his bankruptcy would vest in them absolutely; but the case of *Webb v. Fox*, 7 T. R. 391, is an authority to show that an uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees, and that he may maintain trover for them against a stranger. It is clear, therefore, that the bankrupt has a property in such goods. The assignees have vested in them a right to interfere and claim the property; and if they do make any claim, it is effectual against the bankrupt and all the world; but if they do not interfere, then, as between the bankrupt, (or one claiming under him,) and his debtor, the latter cannot set up their title; but the bankrupt has a right, in a court of law, to enforce the payment of his debt. In *Kitchen v. Bartsch* the assignees claimed the property. It does not appear that the assignees here have interfered or made any claim, and that being so, I am of opinion, that Clarke had a right to endorse this bill. If the assignees shall ever claim the amount of the note from the defendant, and their claim should even be available, it will be in some measure the fault of the defendant; for he might have made the note payable to the assignees, and not to the bankrupt.

*299] *BAYLEY, J.* I am of opinion that the plaintiffs are entitled to retain their verdict on the general issue, and that the verdict on the special plea is not sufficient to deprive them of the judgment in this case. This is an action upon a note payable to Clarke or to the order of Clarke. The defendant, therefore, by making such note, intimates to all persons that he considers Clarke capable of making an order sufficient to transfer the property in the note. The defence now set up is, that although he has issued a security to the world, importing on the face of it that Clarke was capable of making such an order, yet that in fact he was incapable. Now this is a fraud upon the public. It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to endorse such an instrument, when he asserts by the instrument which he issues to the world, that the other has such power. Thus in *Taylor v. Croker*, 4 Esp. 187, before Lord ELLENBOROUGH, a bill was drawn by two infants; the defendants accepted, and the two infants endorsed, and it was held that inasmuch as the defendants had, by accepting the bill, admitted that the infants were competent to endorse, they should not be permitted afterwards to say that they were incompetent. So in this case the defendant has affirmed to the world that Clarke was capable of making an order. The facts are, that the bankrupt endorsed to Knight and Freeman, and that they endorsed to the plaintiffs, and that neither the plaintiffs or K. and F. knew that Clarke was a bankrupt. It is settled by many decided cases, that though an *300] uncertificated bankrupt cannot resist the claim of his assignees to any property which he has acquired since his bankruptcy, yet that he may acquire property and maintain actions in respect of it, unless the assignees interfere to prevent him. This question was much discussed in *Chippendale v. Tomlinson*. That was an action upon an attorney's bill. The defendant pleaded the bankruptcy of the plaintiff before the bill was incurred, and that plea was held insufficient, on the ground that the rights of the assignees were not to be taken into consideration, unless they themselves interfered. That case has since been followed by *Fowler v. Downe*, and other cases. It appears to me that as the defendant, by the form of his note, has stated that he will pay to Clarke's order, he cannot now allege Clarke's inability to make an order as a ground of defence to this action; and, secondly, that the bankrupt may acquire property subsequently to his bankruptcy, and retain that property against all the world, except his assignees.

HOLROYD, J. I think that the plaintiffs are entitled to the judgment of the

court upon the whole record, notwithstanding the verdict found for the defendant upon the special plea. The note was made payable to Clarke or his order, and there was an endorsement by Clarke upon the note. All persons, therefore, not cognisant of his bankruptcy, would see upon the face of the note that which would, *prima facie*, entitle them to take it. Now it may be taken as a general rule, that endorsees of bills of exchange or promissory notes are entitled to recover the sums for which they are respectively made payable, from the persons liable upon the face of the bill or note, notwithstanding the rights of third persons, unless the party taking the bill was cognisant of those rights when he took it. Thus [*301 where a bill of exchange or promissory note, transferable by endorsement, has been lost or stolen, a person deriving his title through another who had no right to endorse, may transfer a right to an innocent endorsee. Here the plaintiff himself gives Clarke authority to endorse, and he asserts to all those who see the bill, that Clarke has that authority, and the assignees have not made any claim. I think, therefore, that the defendant is estopped from setting up their rights. It is not true that the assignment vests absolutely in the assignees all the property acquired by the bankrupt subsequently to his bankruptcy. It would be most injurious to the bankrupt if that were so, for if they were unwilling to sue, and he was unable to sue, the consequence would be, that he might lose property so acquired, and the residue of his property would remain liable to his debts. *Ashley v. Kell*, 2 Str. 1207, is an authority to show that property, even the subject of trade and sale, so acquired by the bankrupt subsequently to his bankruptcy, does not pass absolutely to the assignees, and if that be so, the property acquired by a bankrupt in a negotiable instrument, does not so vest in his assignees.

Judgment for the plaintiffs.

*The Earl of LONSDALE v. NELSON and Others.

[*303

Trespass for breaking and entering the plaintiff's manor. Pleas, first, general issue; second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public navigable river from time immemorial, and that there is in that part of the port which is within the manor, an ancient work necessary for the preservation of the port, and for the safety and convenience of the ships resorting to it; that this work was, at the several times when, &c., in decay; that plaintiff would not repair it, but neglected so to do, wherefore defendants entered and repaired. Replication, *de injuria*. Verdict for plaintiff on first plea, and for defendants on the second: *Held*, that plaintiff was entitled to judgment non obstante veredicto, as the second plea did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port. *Quære*, Whether the plea would have been good had it contained those allegations.

TRESPASS for breaking and entering the *manor* of the plaintiff, called Seaton, and pulling down a quantity of wooden paling and fencing of the plaintiff, and erecting a quantity of wooden paling and fencing, and depositing there a quantity of timber, bricks, stones, and rubbish. The second count was for breaking and entering the *close* of the plaintiff, but in all other respects like the first. Pleas, first not guilty. Secondly, that the close in the second count mentioned, and in which, &c., before and at the said several times when, &c., was, and from thence hitherto hath been, and still is within, and part and parcel of the said manor in the first count mentioned; and that, before and at the said times when, &c., there was, and from thence hitherto hath been, and still is, a certain ancient and public port, haven or harbour, called Workington harbour, partly within the said manor and close; and also in a certain river, to wit, the river Derwent, in a certain part thereof, where the said river now is, and at the said several times when, &c., was, and from time whereof the memory of man is not to the contrary, hath been a public and common navigable river, in which the tides and

waters of the sea, for and during all that time, have flowed and reflowed, to wit, at, &c.; and the defendants further say, *that before and at the said
 *303] several times when, &c., there was, and hath been within that part of the said port, haven or harbour, which is within the said manor and close, a certain ancient work or erection, of and belonging to the said port, haven or harbour, and which was and is requisite and necessary for the support, maintenance, and preservation of the said port, haven or harbour, for the rendering of the same, and the navigation thereof, safe and commodious for the ships and vessels resorting thereto, to wit, at, &c. And the defendants further say, that before any of the said several times when, &c., the said work or erection had been greatly damaged and injured, and was in great decay, and in a bad, ruinous, and dilapidated state and condition, for want of needful and necessary repairing and amending thereof; and that it so remained and continued until, and at the said several times when, &c.; and that before and at the said times when, &c., in the first and second counts mentioned, it was requisite and necessary for the support, maintenance, and preservation of the said port, haven or harbour, and for the keeping and preserving of the same, and the navigation thereof, in a safe and commodious state and condition for the ships and vessels resorting thereto, that the said work or erection should be repaired and amended; but that the plaintiff did not, nor would repair or amend the same or any part thereof, but wholly neglected so to do. Wherefore the defendants, whilst the said work or erection was so in decay, and in a bad, ruinous, and dilapidated state and condition as aforesaid, for the purpose of repairing and amending the said work or erection at the said times when, &c., in the said first
 *204] and second counts mentioned, broke and entered the said *manor and close, in which, &c., and repaired and amended the said work or erection where the same was so in decay, and in a bad, ruinous, and dilapidated state and condition as aforesaid; and because the paling and fencing in the said first and second counts first-mentioned were part of the said erection, and in great decay, defendants pulled them down, and repaired the erection with the paling, fencing, bricks, &c., in the same counts secondly mentioned. The fourth plea stated, that a part of a *public navigable river* was situate within the manor and close; and that the work or erection in question in that part of the river, was requisite and necessary for rendering the navigation of the river safe and commodious, in other respects it was like the second. Replication, de injuria, &c., and issue thereon. At the trial before WOOD, B., at the Cumberland Summer assizes, 1822, a verdict was found for the plaintiff on the issue on the first plea, and for the defendant on the issues on the second and fourth, and as to some other issues the jury were discharged from finding any verdict. In Michaelmas term, 1822, *Scarlett* obtained a rule nisi for entering up judgment for the plaintiff on the issues on the second and fourth pleas, non obstante veredicto, when the court directed that it should be argued as a special case; and now it was argued by

Parke for the plaintiff. It appears upon the pleas under consideration, that the work in question is a private work in a public harbour or river; and judgment must be entered for the plaintiff unless the court decide, that any person may enter and repair such a work, without giving notice to the person bound to repair, or on whose land it stands, before a reasonable time for
 *205] *making the repairs has elapsed, and when the party repairing does not want to use the port or river. For the pleas in question do not aver notice, nor the lapse of a reasonable time, nor occasion to use the port or river. They do not even aver that the plaintiff was bound to repair. There is no statement that any one in particular is bound to repair; surely all the king's subjects are not bound to do it. The plaintiff might have been bound on account of his having dedicated the work to the public. *HALE* de Port. Mar. 78. But there is no allegation of that; and if he be not liable no one else is. But

supposing that he is bound, no instance can be shown where, under such circumstances, any person may repair according to his own judgment. If that were lawful, the obligation might be made doubly burthensome; for, first, it might be necessary to undo the imperfect repairs done by a stranger before proper and substantial repairs could be done. It will no doubt be contended, on the other side, that the pier or erection, in its dilapidated state, was a nuisance, and that the defendant might therefore enter to reform it. But there is a distinction in this respect, between nuisances of commission and those of omission. There are several cases put in 2 Roll. Abr. 144, *Nuisance* (S), and Vin. Abr. *Nuis.* (S), as to the reformation of a nuisance by the party grieved, or by any individual of the public, and each of those is a case of commission. This distinction is supported by analogy to the writ of assize of nuisance. Now, that does not lie for neglect, but only for commission. 2 Roll. Abr. 141, *Nuisance Ass.* (H), pl. 9, citing 11 H. 4, c. 83, "If a man who ought to scour a ditch does not do it, by means whereof my field is drowned, no assize lies." The object of that writ is to give damages to the party, and to *remove the nuisance; but the party grieved may enter and abate it; 17 Ed. 3, 44; [*306 9 Ed. 4, 35; *Penruddock's* case, 5 Co. 101; and if he does so, pending the writ, the writ shall abate; Fitz. N. B. 183, note a; *Baten's* case, 9 Co. 55. It therefore seems, that where a party may have an assize of nuisance, he may, if he chooses, enter and redress the injury himself; but where he cannot have assize, there is nothing to show that he can enter. Now it has been already shown, that assize does not lie where the nuisance is merely one of omission; the party is then left to the common-law remedy by indictment. If that be the general rule, the pleas are clearly bad. But at all events they are bad for the want of an averment, that notice of the state of the pier was given to the plaintiff, or that a reasonable time for repairing it had elapsed. Such a work might very possibly sustain a sudden injury by a violent storm; yet, if these pleas are good, any person might enter and repair it the very next day, according to his own idea of what was necessary to be done. This argument ab inconvenienti appears conclusive.

E. H. Alderson, contra. There is not any solid distinction between nuisances of commission and those of omission. Pulling down a pier would belong to the former class; but the public sustain an equal injury whether the pier be pulled down or suffered to fall for want of needful repairs. The case may be considered in two ways; either on the supposition that no person is bound to repair, or that some person is. There certainly is not any direct authority to show that any person is bound by the common law to repair such a work as that in question, although an individual may be bound by *pre- [*307 scription. The only dictum to that effect is in Brook Abr. *Presentment in Court*, pl. 9; and there a quære is added, with this observation, "It appears that the opinion is not law." Such a work differs materially in this respect from a highway: the parish are bound by the common law to repair the latter, and may be indicted, unless they can show that some other person is liable. But whom could you indict for neglecting to repair such a work as this? If then no person be liable, the work being for the benefit of the public, any one may enter for the purpose of repairing. It is admitted on the other side, that an indictment would lie if such a work were pulled down; but contended, that the public are without remedy if it be suffered to fall. There are, however, many dicta, that any one may abate or reform a public nuisance, expressed in terms sufficiently general to embrace such a case as this. Lord HALE, De Port. Mar. pt. 2, c. 7, says, "Nuisances of ports are of two kinds. First, such as are immediately only nuisances to the private concernment of the lord of the franchise. Secondly, such nuisances as are common to all men that have occasion to come, go, or stay at ports. I will give instances of some: first, silting or choaking up the port, either by the sinking of vessels

in the port, or throwing out of filth or trash into the port whereby it is choked. Secondly, decays of the wharfs, quays, and piers, which are for the lading of merchandise and safeguard of shipping." Now the latter is clearly a nuisance of omission. After putting some other instances of this second sort of nuisances, Lord HALE, speaking with reference to all that had gone before, says, "Any man may justify the removal of a common nuisance either at land or by water, *308] because every man is concerned in "it;" and he makes no distinction between nuisances of commission and omission. There are many cases in which any one may justify interfering with the property of another to prevent an injury to the public. Thus, if a house in a street were likely to fall, it might be pulled down; or, if a bank of the sea were likely to break, and a festinum remedium were necessary, any one might apply it. So, according to *Mouse's case*, 12 Co. 63, a house may be pulled down to prevent the spreading of a fire; which is a strong case, for there an injury is done to the individual for the public good. In Bro. Abr. *Nuis.* 28, it is said that a man is not bound to cut his trees which overhang the road, and therefore another may do it. If, then, no person is bound to repair the work in question, the defendant was justified in doing it. In *Rex v. Wilcox*, 2 Salk. 458, it appeared that the defendant being indicted for a nuisance, was convicted and fined; and it was moved, that by the general pardon the defendant was excused both as to the fine and the abatement of the nuisance. But the court held, that he should be discharged only as to the fine, and not as to the abatement; for that was not a punishment of the party, but a removal of that which was a grievance to other people, and any person may abate a public nuisance. That case shows that the public have two rights in cases of nuisance; one to punish the offender, and the other to vindicate themselves. Secondly, omission in the party is commission against the public; and, therefore, if the plaintiff was bound to repair, his neglect made him a tort-feasor, and he cannot maintain an action for that which arose out of *309] his own wrongful act. [BAYLEY, J. "The plea does not state how long the work had been ruinous, or that the plaintiff knew it was so, or that a reasonable time for repairing had elapsed, or that immediate repairs were necessary."] If the negative of any of those circumstances could have been proved for the plaintiff, they should have been replied; but as that was not done, it must, after verdict, be presumed that every thing necessary to justify the verdict was proved by the defendant.

Parke, in reply. It is not necessary to dispute the authorities cited on the other side, for they merely support a principle which does not arise on this record, viz., that any person may justify the removal of that by which his majesty's subjects are placed in immediate danger. There is nothing to show that any such danger existed in this case. The question then rests upon the general authority to repair without notice, and before the lapse of a reasonable time, and without occasion, in the party repairing, to use the port. But it is said that the plaintiff is not bound to repair. The pleas seem to have been framed upon an opinion that he was so bound, for it is alleged that he did not nor would repair, but neglected so to do. But supposing him not bound, there is not any authority to show that any person may repair. There might possibly be a dedication of the work to the public for so long as it would last; and then an indictment for removing it might be maintained, but not for suffering it to decay. As for the passage in Lord HALE, *De Port. Mar.*, where he is supposed to say that any one may abate a nuisance, with reference to those of omission as well as com- *310] mission, it is somewhat singular that the example *which he adds is a nuisance of commission. "The burgesses of Southampton justified the throwing down of a wear belonging to the Abbot of Tichford, in a creek of the sea, quia levata fuit ad nocumentum domini regis et villæ Southampton et quod batelli et naves impediuntur quominus venire possunt ad portum villæ."

And he adds, "But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary courts of justice."

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to judgment non obstante verdicto, on the second and fourth pleas. This was an action of trespass; the first count charged a breaking and entering of the plaintiff's manor, and the second count a breaking and entering of the plaintiff's close. The only difference between them is the substitution in the latter of the word *close* for *manor* in the former. On the general issue a verdict was found for the plaintiff. It was therefore established that he was entitled to the manor and close, and in possession of both; and the only question is, whether the special pleas are a good justification of that which was done. Now it is incumbent on him who enters upon the land of another to show that he has a right so to do. The substance of the pleas is, that there is an ancient and immemorial harbour and navigable river, partly situate within the manor and close; and that in that part which is within the manor and close, there is an ancient work or erection, (not that there has been such a work from time immemorial,) requisite and necessary for the maintenance of the port, and for rendering the same, and the navigation of the river, safe and commodious for the ships resorting thereto. There *is a further allegation, that this work was in a state of decay, [*311 and that the plaintiff did not nor would repair it, but neglected so to do; wherefore the defendants entered and repaired. The defendants have not alleged that immediate repairs were necessary, nor that any person bound to repair had neglected to do so after notice, nor that a reasonable time for making the repairs had elapsed. They have not even alleged that they had occasion to use the port or river; and for any thing that appears on these pleadings, they may have been mere volunteers, not at all interested in the preservation of the work in question, nor prejudiced by the want of those repairs which they thought fit to do. Upon these grounds I am of opinion that judgment must be entered for the plaintiff, on the issues on the second and fourth pleas.

BAYLEY and HOLROYD, Js., concurred.

BEST, J. Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call *on the [*312 person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord HALE, and appeal to a court of justice. It is not stated in this plea that this building had been out of repair for any time. An accident the day before it was repaired might have reduced it to the state in which it was found by these defendants. Neither does it appear that this building was immediately wanted, either for the safety or convenience of such as resorted to the port, or that these defendants ever had or were ever likely to have occasion to use it, or had any more right to interfere with the repairs of it than all the other subjects of the realm. If no person in particular be bound to repair, those who wish to do any repairs ought to give him on whose land they have occasion to enter for that purpose some notice of their intention, that he may decide whether he will not rather do what

is necessary himself, than suffer the intrusion of strangers upon his estate. I am, therefore, of opinion, that these pleas cannot be supported.

Judgment for the plaintiff.

*313] *NIGHTINGALE v. MARSHALL and Another.

In the parish of W., the poor-rates, according to an ancient custom, had always been made without respect to the value of property in the parish, but according to the supposed ability of the party charged: *Held*, that persons so rated, were not rated in respect of any annual rent, profit, or value, within the meaning of the 58 G. 3, c. 69, s. 3, and therefore were not entitled to more than one vote at vestry meetings, although rated upon more than 50*l*.

CASE for a false return to a writ of mandamus. The declaration stated, that on the 22d November, 1821, the office of sexton of the parish of Saint Mary, Whitechapel, became vacant; that the plaintiff was nominated and elected to the said office by a majority of the persons entitled to vote; that the defendants being churchwardens of the said parish, ought to have admitted the plaintiff to the said office, but they refused so to do; and in return to a writ of mandamus, issued on the 11th day of February, 1822, commanding them to admit the plaintiff to the said office, they falsely returned that the said plaintiff was not duly nominated and elected to the said office. At the trial before ABBOTT, C. J., at the sittings in Middlesex after last Trinity term, a verdict was found for the plaintiff with nominal damages, subject to the opinion of the court upon the following case. The office of sexton for the parish of Saint Mary, Whitechapel, in the county of Middlesex, is an ancient office, and the right of election is in the inhabitants of the said parish, paying church and poor's rates, in vestry assembled. In November, 1821, the office became vacant, and on the 22d November a public meeting was duly holden for the election of a sexton. There were two candidates, the plaintiff and one J. W. While the election was proceeding, several inhabitants of the parish entitled to vote, claimed a right to give more than one vote under the 58 G. 3, c. 69, s. 3, by which it was enacted, *314] "That in all such vestries every inhabitant *present, who shall by the last rate, which shall have been made for the relief of the poor, have been assessed and charged upon, or in respect of, any annual rent, profit, or value, not amounting to 50*l*., shall have and be entitled to give one vote and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon, or in respect of, any annual rent or rents, profit or value, amounting to 50*l*. or upwards, whether in one, or in more than one sum or charge, shall have and be entitled to give one vote for every 25*l*. of annual rent, profit, and value upon or in respect of which he shall have been assessed or charged in such last rate; so, nevertheless, that no inhabitant shall be entitled to give more than six votes." At the close of the election the numbers were, for J. W. 639, and for the plaintiff 631; but if a plurality of votes was admissible in the parish of Whitechapel, with respect to the election of a sexton, pursuant to the 58 G. 3, c. 69, s. 3, such a number of votes was tendered as was sufficient to give the plaintiff a majority of votes. The defendants were churchwardens of the parish at the time of the election, and they admitted J. W. to the office; and in return to a mandamus, commanding them to admit the plaintiff, they returned that the plaintiff was not duly nominated and elected; and the only question in the case is, whether under the circumstances herein-after stated, a plurality of votes was admissible at the said election, pursuant to the statute 58 G. 3, c. 69, s. 3, so as to entitle the inhabitants, paying rates as aforesaid, at the election of a sexton to give more than one vote. In point of fact, the poor-rates are not assessed, and never have been assessed, upon all the *315] inhabitants uniformly, according to an equal pound-rate; *but the rate purports to be made, and, according to an ancient custom in the parish always, has been made, by the discretion of the vestry, without respect to value.

but according to the ability of the party charged, such ability being estimated with reference to property, whether in the parish or out of it. In some instances the property is stated in respect of which the party is charged; but in a great majority of cases the property is not stated, and where it is stated, the rate is not in proportion to the rent of the property; for example,

Rent.		Poor's rate.	Church-rate according to an equal pound-rate.
£.		£. s.	
40	L. Turner for two cooperages	5 11	
40	Alexr. Mann for house - -	10 15	
50	Mr. Lucas for house - - -	9 10	

The case was now argued by

F. Pollock for the plaintiff, who contended, that notwithstanding the mode of rating according to the ability of the party charged, and without respect to value, still as the rating was "*in respect of*" some annual rent, profit, or value, the amount of which was ascertained for the purposes of the church-rate, the statute 58 G. 3, c. 69, applied in principle, and was applicable in point of fact. The rate for the church was an equal pound-rate; and although the poor-rate was not in proportion to annual value, it was according to the words of the act, "*in respect of it*," for no person could be rated except with reference to some annual value. The intention of the legislature appeared to be, to give a preponderance to property. The right to give more than one vote depends merely on being assessed in respect of annual value of 50*l.* or upwards; [*316 and the statute refers to the property, and not the amount of the rate. A statute so beneficial ought to be liberally construed; and unless the court should construe "*in respect of*" to mean the same as "*in proportion to*," the present case was within its provisions.

Parke, contra, was stopped by the court.

ABBOTT, C. J. I give no opinion to the validity of the rates in question. My opinion is founded entirely on the third section of the 58 G. 3, c. 69, which provides for a plurality of votes. By that section it was enacted, "that every inhabitant who shall by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit, or value, not amounting to 50*l.*, shall have and be entitled to give one vote and no more; and if upon an annual rent, profit, or value, amounting to more than 50*l.*, he shall have one vote for every 25*l.*, of annual rent, &c., upon which he is assessed. Looking at this rate, I am clearly of opinion, that no person in the parish of St. Mary, Whitechapel, is rated *upon or in respect of any annual rent, profit, or value*. If the rate were so made, it must be proportioned to the amount of the rent, profit, or value, in respect of which it is imposed. It is not so proportioned; and it therefore appears not to have been imposed in respect of the property mentioned in the act, but in respect of some ability to contribute to the relief of the poor, measured by some other standard. I am therefore of opinion, that the provisions of the 58 G. 3, c. 69, [*317 respecting a plurality of votes, do not apply to the parish in question; the plaintiff, consequently, was not duly elected to the office of sexton, and a nonsuit must be entered.

BAYLEY, J. I am of opinion that this parish is not within the operation of the 58 G. 3, c. 69, s. 3. The general rule is, that there shall be an equal pound-rate upon the property in the parish, therefore all persons having an estate equal in value contribute the same sum. The value of their property is the criterion of the rate. It was the intention of the legislature, by the statute referred to, to increase the power which each inhabitant would have at the vestry-meetings,

in proportion to the burthen borne by him. This parish cannot have the benefit of that act, for the custom (which may be legal) to make the rate in a particular mode, prevents the property of any individual in the parish being a criterion of the burthen borne by him. We cannot then say that the rate is imposed in respect of any annual rent, profit, or value; and unless that be so, the provision for a plurality of votes does not apply.

HOLROYD, J. The rate stated in this case is not such as to bring the parish within the provisions of the third section of the 58 G. 3, c. 69. To be within that, the parties must be assessed upon some annual rent, profit, or value: the rate does not show that they have been so assessed. Certain rents are stated, but the inequality of the rate shows that it is not imposed in respect of those rents; nor does it appear to have been imposed in respect of any profit or value, much less annual profit or value. It is left uncertain respect of *what [318] it is assessed, and therefore is quite insufficient to make the 58 G. 3, c. 69, s. 3, applicable to their vestry meetings.

BEST, J. If the inhabitants of St. Mary, Whitechapel, are anxious to avail themselves of the provisions in the vestry act, they must alter their mode of rating. By that act it is not sufficient that the parties should be rated at 50*l.* or upwards; to have more than one vote, they must be rated in respect of annual rents, profit, or value. Now it is stated in the case that each inhabitant is rated according to the discretion of the vestry, and the rate itself shows that the amount of it is not regulated by the amount of property in the parish. If so, it cannot be made according to the principle laid down in the act; and therefore no person can, by virtue of that act, be entitled to a plurality of votes. I therefore agree that a nonsuit must be entered.

Judgment of nonsuit.

JONES and HIRST v. R. SIMPSON, Sir J. PINHORN, J. GREEN,
D. NELSON, G. WILSON, W. FULFORD, and T. BRADLEY.

A. having consigned goods to B., sent him the following order: "Pay to A. B. the proceeds of a shipment of goods, value about 2000*l.*, consigned by me to you." C., by writing, consented to pay over the full amount of the net proceeds of the goods: *Held*, that neither of these instruments required such a stamp as the stamp acts imposed on bills, drafts, or orders for the payment of money.

This was a case sent by the vice-chancellor for the opinion of this court.

In the year 1811, W. Blackburn carried on the business of a merchant, at Saddleworth, in Yorkshire, and the defendant, Simpson, carried on the business of a *merchant, in partnership with the defendant Wilson, of Quebec, in [319] Canada, such business being carried on in London in the name of Simpson alone, and at Quebec, under the firm of G. Wilson and Co. In the year 1811, W. Blackburn delivered to Simpson twelve bales of woollen cloth, invoiced at 1640*l.* 17*s.* 10*d.*, to be shipped and consigned to the firm of G. Wilson and Co., at Quebec, to be sold there on the account and at the risk of Blackburn. They were duly shipped by Simpson, and consigned to and received by the firm of G. Wilson and Co., at Quebec, by whom the same were sold, and the proceeds, or some parts thereof, were afterwards remitted to Simpson. On the 7th of August, Blackburn wrote and sent to Simpson the following order: "Mr. R. Simpson, please to pay to Nelson, on account of the assignees of Oakley Overend, and Oakley, the proceeds of a shipment of twelve bales of goods, value about 2000*l.*, consigned by me to you. On the 21st of the same month, Simpson wrote and sent to the defendant Nelson, as one of the assignees of Oakley, Overend, and Oakley, the following undertaking: "Shipped on board the Sarah from London to Quebec, for the account of W. Blackburn, twelve bales of woollen cloth, value, as per invoice, 1640*l.* 17*s.* 10*d.*; there to be sold, and the proceeds

to be paid by his order, dated the 7th instant, to the assignees of Oakley, Overend, and Oakley. In pursuance of the said order of Blackburn, I do hereby consent and engage to pay over the full amount of the net proceeds of the said twelve bales of woollen cloths, as I may from time to time receive the same, unto the said assignees without delay." On the 15th July, 1812, a commission of bankrupt issued against the said W. Blackburn, under which the plaintiffs, Jones and *Hirst, were chosen assignees. Pursuant to an order made [*320 in this cause, bearing date the 23d day of July, 1818, Simpson paid into the Bank of England, in the name of the accountant-general, in trust in this cause, the sum of 400*l.* 5*s.* 7*d.*, in respect of the proceeds of the said bales of woollen cloths. Simpson has since become bankrupt, and the defendants W. Fulford and T. Bradley are the assignees under the commission against him. The question for the opinion of this court was, whether the above two instruments, or either, and which of them, require such a stamp as the stamp acts impose upon bills, drafts, or orders for payment of money.

Littledate for the plaintiffs. The 48 G. 3, c. 149, was the stamp act in force at the time when these instruments were signed. Now in schedule, part 1, title *Bill of Exchange*, certain duties are first imposed upon bills, with reference to the sums for which they are made payable; and then upon any bill, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated period, where the total amount of the money shall be specified therein, or can be ascertained therefrom, the same duty is imposed as upon a bill for a sum equal to the total amount. [ABBOTT, C. J. No sum is specified in this instance, nor can it be ascertained from the instrument; that clause is therefore wholly immaterial.] It shows that the sum to be paid may be ascertained in different ways; and if in any way a sum certain appears to be due, that is the sum to regulate the duty. The next clause provides for the case where the total amount of the money thereby mentioned to be payable shall be indefinite, and then the same duty attaches as *on a bill for the sum expressed only. [ABBOTT, C. J. Here no specific sum was expressed. [*321 Suppose the order be to pay all the money due, what is the duty to be imposed?] The schedule then proceeds to declare, that several instruments shall be deemed bills, drafts, or orders for the payment of money, and one of them is a draft or order for the payment of a sum of money out of a particular fund, which may or may not be available. Now here the order is for the payment of the proceeds of a shipment, value about 2000*l.*, or in other words, for the payment of a sum of money out of a fund which may or may not be available, and when the amount of those proceeds was ascertained, a stamp appropriate to a bill for that amount ought to have been affixed to the instrument. A similar clause in the stamp act 55 G. 3, c. 184, was considered to apply to an instrument of this description, in *Firbank v. Bell*, 1 B. & A. 36, and *Butts v. Swan*, 2 B. & B. 78. There indeed the sums payable were specified upon the face of the instrument. [BAYLEY, J. The act imposes duties upon bills of exchange and promissory notes, which were well-known instruments. There were other instruments, however, nearly in the same form, but which did not come within the description of bills of exchange or promissory notes, because the money was payable out of a particular fund, or upon a contingency, and the legislature probably had those instruments in contemplation in the clause which has been referred to. This instrument, however, would not be a bill of exchange if the proceeds were not payable out of a particular fund, because the order was not for a specific amount.]

**Marryat* was to have argued on the other side, but the court said [*322 the case was too clear to admit of any doubt.

The following certificate was afterwards sent:

This case has been argued before us, and we are of opinion that neither of

the two instruments required such a stamp as the stamp acts impose on bills, drafts, or orders for the payment of money.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.

THE KING v. PINNEY and Another.

A local act directed that the then overseers of the parish of W. should continue to be overseers for the remainder of the current year, and until two others should be appointed, and that two overseers should be appointed annually: *Held*, that this act did not repeal the statute 43 Eliz. c. 2, s. 1, and that an appointment of four overseers for the parish of W. was valid.

By statute 47 G. 3, sess. 2, c. 111, s. 92, (local and personal acts,) it was enacted that the then overseers of the parish of Woolwich should continue to be overseers for the remainder of the year 1807, and until two other overseers should be nominated and appointed, in the manner and at the time by law directed, to succeed them; and in Easter week, or within one month of Easter, in every year, two persons being substantial householders in the said parish, should be nominated and appointed, in the manner by law directed, to be overseers of the poor of the said parish. By an order of two justices, made on the 25th March, 1823, four persons therein named were appointed overseers of the *323] poor of the parish of Woolwich, and upon appeal the *sessions confirmed that order. A rule nisi having been obtained for quashing the order of sessions,

Bolland and *Andrews* now showed cause, and contended, that although the local act compelled the justices to appoint two overseers, it did not restrain them from appointing more than two. In *Rex v. Loxdale*, 1 Burr. 445, it was held, that under the statute of Elizabeth more than four could not be appointed, but there the number fixed being four, three, or two, clearly showed that it was the intent of the legislature to prevent the appointment of a greater number; now here, before the local act, more than two might have been appointed, and there are no express words in that act denoting the intention of the legislature to make any alteration in that power. The act only requires that two, at all events, shall be appointed.

Scarlett and *Adolphus* contra contended that as the local act expressly directed that two should be appointed, it must be taken that the legislature intended that the overseers should not exceed that number.

ABBOTT, C. J. It is a general rule of construction that affirmative words in a later statute do not repeal a former, unless there be something wholly inconsistent in the provisions of the two statutes. Lord C. B. COMYNS, in his Digest, tit. *Parliament*. R. 25, lays it down that such affirmative words do not take away a former statute, unless they in sense contain a negative. Now the statute of Elizabeth directs that the overseers for parishes shall be four, three, or two *324] substantial *householders. The local act merely directs that the then overseers should continue in office to the end of the year, and until two others should be appointed, and that two others should be annually appointed. These words do not, in sense, contain a negative, nor is there any inconsistency between a provision authorizing the appointment of four, three, or two overseers, and another directing the appointment of two. The latter statute requires absolutely that two shall be appointed, but it does not say that more than two shall not be appointed. That being so, I am of opinion that the provision of the statute of Elizabeth as to the appointment of overseers, is not repealed by the local act, and that the order of justices was right.

Rule discharged.(a)

(a) See Plowden, 112, 113, and *Rex v. Burrige*, 3 Peere W. 461.

The KING v. ANTHONY COLLETT, Clerk.

Overseers of the poor are bound to endeavour to find work for the able-bodied poor who are out of employment. *Quære*, Whether they can legally give relief to such persons, otherwise than by setting them to work and paying them for their labour.

UPON an appeal against an order of two justices for the allowance of the accounts of the overseers of the poor for the parish of Kelsale, in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this court on the following case. "The appellant (Mr. Collett) is the proprietor of a considerable estate in the parish of Kelsale, a part of which is in his own occupation. In consequence of the extreme depression in the price of agricultural produce for the last two or three years, the farmers have been rendered *unable to make any improvements on their lands, and consequently have [*325 employed very few labourers, by which means a considerable part of the labouring population has been totally unemployed, and during this period, all poor persons belonging to the parish, who have been unable to obtain employment, have received sums of money for their maintenance from the parish officers in proportion to the number of their respective families, for which no labour has been required from them. The appellant being dissatisfied with this application of the parish funds, appealed against the overseers' accounts. The respondents, upon the hearing of this appeal, admitted that the persons to whom the sums objected to in the account were paid, were in fact both able and willing to work, but that no employment could be obtained for them, which the appellant contended, the overseers were bound to provide pursuant to the statute of 43 Eliz. c. 2, although no evidence was adduced to prove that the overseers could have employed the labourers. It also appeared, that none of the sums objected to were paid under or in consequence of any orders from a magistrate. The parishioners were accustomed to meet once a week at the parish workhouse, at which meetings all applications for relief were received, and where all labourers belonging to the parish, who had not in the preceding week been in constant employment, attended to give an account of their earnings, and received such sums as, with the earnings, should amount to a sum deemed competent to their maintenance in proportion to the number of their children. In several cases, it appeared that able-bodied men with four or five children, having had no employment in the preceding week, received from the *overseers from 7s. [*326 to 8s. 6d. for the week; having been employed three days, 3s. 6d. to 4s. per week; having been employed two days, 5s. per week, and so in proportion to the number of their children and the amount of their week's earnings. And in all cases this relief was afforded to these persons, solely on the ground of their having been out of employment, without reference or inquiry as to any means they might have of raising money for the supply of their immediate wants by sale or pledge of their household effects; and that in many instances, the weekly relief was afforded to various able-bodied labourers for many weeks in succession.

Cooper and Biggs Andrews in support of the order of sessions. Three questions arise in this very important case. First, whether able-bodied persons are entitled to relief under the provisions of the 43 Eliz. c. 2; secondly, whether they are entitled to relief unless the overseers set them to work; and, thirdly, whether they are entitled to relief without a specific order from a magistrate. As to the first, overseers may give relief to poor persons capable of working, but unable to find employment. The 43 Eliz. c. 2, s. 1, authorizes the raising of "competent sums of money, for and towards the necessary relief of the lame, *impotent*, old, blind, and such other among them being poor and not able to work." The word *impotent* there applies to those who are unable to maintain themselves on account of being out of employment, or being unable to obtain a competent sum as wages, as well as to those who are incapable of

working from the want of bodily power. In *Waltham v. Sparks*, Skin. 556, Comb. 320, S. C., *EYKES, J., speaking of one of the parties then before *327] the court, says, "Joseph having more children than he could maintain, is *impotent*, as much as if he had been so by lameness." And that is a reasonable construction, for it would be extremely unjust to say, that persons able and willing to work, but out of employment, are not to be relieved; inasmuch as the distress which they suffer does not arise from any fault of their own, or from any cause over which they have the slightest control. The 8 and 9 W. 3, c. 30, (certificate act,) confirms this view of the case. The preamble begins by reciting, "Forasmuch as many poor persons chargeable to the parish, &c., where they live, *merely for want of work*, would in any other place where sufficient employment is to be had, maintain themselves and families;" now, that plainly shows that the legislature considered a pauper out of employment entitled to relief on that ground. And the 9 G. 1, c. 7, which provides, that no justice shall order relief to any poor person until oath be made of some matter, which he shall judge to be a reasonable cause of having such relief, and of certain other things having been done which are there pointed out, impliedly gives power to the justice to order relief where any reasonable cause of giving it exists; and it is surely a sufficient cause for having relief, that a person able and willing to work is unable to find employment. Then, secondly, such paupers are entitled to relief although the overseers do not set them to work. For a long series of years no stock has been provided by overseers according to the mode pointed out by the 43 Eliz. c. 2, and for this plain reason, that since that statute was passed, every description of manufacture has been so much improved, that the *328] articles manufactured under the directions of *the overseers would not be saleable; and, therefore, providing materials for the poor to work upon would only bring an unnecessary burthen on the parish. And the 43 Eliz. c. 2, is not imperative but discretionary, for it says in section first, that "the churchwardens and overseers shall *take order* from time to time, by and with the consent of two or more justices of peace for the county, for setting to work the children of all such whose parents shall not by the churchwardens or overseers, or the greater part of them, be thought able to keep and maintain their children; and also for setting to work all such persons married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by." The expression "to take order" shows that they were to exercise their judgment upon the propriety of setting to work the persons pointed out. But if it be imperative, although the overseers may be indicted for disobeying the statute, still the poor are in the meantime entitled to relief. If there be no law authorizing the giving of money to poor persons out of employment, there is none to authorize the giving of it to those who are fully employed, but unable to obtain wages sufficient for their maintenance. But the 9 G. 1, c. 7, s. 2, shows that the law is not so, for it is there enacted, that "no officer of any parish shall, (except upon sudden and emergent occasions,) bring to the account of the parish *any moneys* he shall give to any *poor person* of the same parish (not "moneys laid out for materials,") who is not registered in the books to be kept by the parish, (a) as a person entitled to receive collection, on *329] pain of forfeiting the sum of 5*l*." This statute *recognises a power to give money to any poor person, and does not confine those entitled within the description in the 43 Eliz. c. 2, even supposing that description is to receive the narrow construction which will be contended for on the other side. Thirdly, the overseers were justified in giving relief without a specific order from a magistrate. The case certainly is not within the last cited statute for want of such order, but it is within the 36 G. 3, c. 23, s. 1, by which it is enacted, "That it shall be lawful for the overseers of any parish, &c., with the approbation of the parishioners, or the majority of them, in vestry or other usual place of meeting

(a) See 3 and 4 W. & M. c. 11, s. 11.

assembled, or with the approbation in writing of any of his majesty's justices of the peace acting for the district, to distribute *and pay* (plainly meaning the giving of money,) collection and relief to any industrious poor person or persons at his, her, or their homes, &c., under certain circumstances of temporary illness or distress." It is stated in this case, that the parishioners were accustomed to meet once a week at the parish workhouse, at which meetings all applications for relief were received. The overseers have, therefore, complied with the first part of the alternative in the 36 G. 3, c. 23, s. 1, and are entitled to have the sums in dispute allowed. The persons relieved are stated to have been out of work: now that was a temporary distress, the duration of which was quite uncertain; and, although it might continue for several weeks, would still be within the meaning of the act. And as the parishioners, who have to support the poor, are also to decide upon their claims to relief, that circumstance is a sufficient check to prevent any improper expenditure of the parish funds by the overseers of the poor.

**Scarlett and Eagle*, *contra*. The overseers of the poor are not, by the 43 Eliz. c. 2, warranted in giving pecuniary relief to persons able to work, without requiring work from them, and that power has not been enlarged by any subsequent statutes. It has been pretty generally taken for granted, that the 43 Eliz. c. 2, was the first legislative provision for the maintenance of the poor, but that is an erroneous supposition. It certainly embraces all the former laws, and was the result of all the experience then obtained upon the subject: but there are earlier statutes, and some of them throw light upon the question now under consideration. There is not, however, in any one of them, a single expression which gives colour to the idea, that any persons are entitled to relief in money, unless as a remuneration for their labour, except those who are unable to labour, by which a physical inability must be understood. The preamble of the 5 Eliz. c. 2, is worthy of much attention; "to the intent that idle and loitering persons and valiant beggars be avoided, and the *impotent, feeble, and lame*, which are the poor in very deed, should be hereafter relieved and well provided for." It then enacts, "that a book shall be kept in which the names of all householders and inhabitants shall be entered, also the names of all such impotent, aged and needy persons which are not able to live of themselves, nor with their own labour; for them a collection is to be made, and the parson and churchwardens are to appoint two able persons to be gatherers and collectors, and the collection is to be distributed to the said poor and impotent persons, after such sort, that the more impotent may have the more help, and such as can get part of their living to have the less, and by the discretion of the collectors to be put in *such labour as they be fit and able to do*." Here, then, was an enactment that provision should be made for the poor, and the means of making that provision are pointed out, viz., by setting to work those who are capable of working, and giving pecuniary relief to the impotent. Nothing could more clearly show the intention of the legislature upon this point, than the provision that those not wholly impotent should do as much work as they were able. No material alteration was made by any subsequent statute, until the whole of them were incorporated in the 43 Eliz. c. 2, the first section of which enacted, "that the overseers should raise weekly or otherwise, by taxation, in the manner there specified, a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, to set the poor on work, and also competent sums of money, for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor and not able to work, and to do and execute all other things, as well for the disposing of the said stock, as otherwise, concerning the premises, as to them shall seem convenient." Now there is nothing in that enactment which binds the overseers to employ the poor in any particular work. The means of employing them pointed out by the act are only to be adopted if they should be thought the best.

The overseers are expressly authorized to do such other things touching the premises, that is, the employment of the poor, as to them shall seem convenient; that gives them authority to instruct the poor in trades; and if the labour of the poor becomes unnecessary in the old channels, it is the duty of the overseers to divert it into a new one. It is not contended, that a person out of employment is to be suffered to starve, because *he is able to work, or that he is not entitled to relief, but that relief must be provided by setting him to work in some way or other. The construction which has been put upon s. 7 of the 43 Eliz. c. 2, strongly corroborates the idea, that *impotent* in the first section means those physically unable to work. That section enacts, "that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work (being of sufficient ability), shall at their own charges relieve and maintain every such poor person in that manner and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, at their general quarter sessions shall be assessed." The dictum of EYRES, J., in the case of *Waltham v. Sparks*, has been referred to, as showing that the word *impotent* includes those who cannot obtain employment; but when the case itself is examined, it appears not to justify any such conclusion. It was an action of debt on a bond, conditioned to save the parish of S. harmless from John Godion, his wife and children; defendant pleaded non-damnificatus; plaintiff replied, that Joseph, son of John, born at the time of the obligation made, his wife and children, were a charge to the parish, for *Joseph was impotent*, and 2s. a week were paid to Joseph for the maintenance of himself and his family, of which 8d. was for the maintenance of Joseph. Defendant rejoined and traversed, that the 8d. was applied to the maintenance of Joseph. On demurrer, judgment was given for the plaintiff. Now it is quite clear that the bond was forfeited, whether the money was applied to the maintenance of Joseph or his family. It was paid to him, "because he was impotent." The *dictum of EYRES, J., was quite unnecessary and extra-judicial. Then, in *Rex v. Guiley, Foley*, 47, 1 Bott. 366, S. C., an order, made under 43 Eliz. c. 2, s. 7, set out, that one M. G. was in a *poor, destitute* condition, and that her father was able to maintain her; and the order was quashed, because it did not appear that she was *lame, blind, or unable to work*. So in *Rex v. Litton*, 1 Bott. 366, upon complaint that A. was deserted and impotent, the justices adjudged and awarded the father to pay so much a week, and the order was quashed, because there was no *adjudication* that she was *impotent*. These decisions were recognised and acted upon in *Rex v. Hayworth*, 1 Str. 10, 1 Bott. 402, S. C., and in *Rex v. Stoke Ursey*, 1 Bott. 403, n., and *Rex v. Tipper*, 1 Bott. 403, n.(a) The same words are used in the first section of the 43 Eliz. c. 2, to point out who are to receive pecuniary relief from the parish, as are afterwards introduced into the seventh, respecting the support of parents by children, or the reverse. The orders under those sections are made in *consimili casu*. Now it is clear, that a good order cannot be made upon a parent to support a child, unless it be shown that the child is impotent; and it would be absurd to say that a similar order upon the parish would be valid. The next statute bearing upon this question is, the 13 and 14 Car. 2, c. 12. The third section of that act enables persons to go out of their own parish to work in another, taking with them a certificate that they belong to the parish which they leave, and it provides that "if they shall not return when their work *is finished, or shall *fall sick or impotent, whilst they are in the said work, it shall not be accounted a settlement, but they may be removed to the place whence they came. There the word *impotent* clearly means un-

(a) See also *Kilbeck's case*, 2 Keb. 37, pl. 79; *Rex v. Grant*, ib. 537, pl. 61; *Rex v. Pryn*, ib. 643, pl. 75; *Rex v. May*, ib. 744, pl. 50; an anonymous case, 5 Mod. 397, ca. 200, and *Kimmallon v. Laystas*, 2 Bulst. 347.

able to work, not unable to procure work. The subsequent part of the same section enacts, "That if the churchwardens and overseers of the poor of the parish to which such persons shall be removed refuse to receive them, and to provide work for them, as other inhabitants of the parish, they shall be subject to indictment." Nothing could be a plainer recognition of the obligation, to find work for those out of employment, imposed on the overseers. Then followed the 3 and 4 W. & M. c. 11, to which, perhaps may be traced the present practice of allowing relief in money to persons not included in the description, in the first section of the 43 Eliz. c. 2. The latter statute left the distribution of the funds collected in the discretion of the overseers, subject to no other control than the allowance of their accounts; that power was abused, as appears by the recital in the 3 and 4 W. & M. c. 11, s. 11, which then provides "that books shall be kept, and the names of those who receive collection registered therein, together with the causes of their receiving relief; and that no person not entered in those books should be allowed to receive collection at the charge of the parish, but by the authority of a justice of peace residing within the parish, or (if none should be there dwelling) in the parts near adjoining, or by order of the quarter sessions, except in certain cases of emergency." It has been supposed that a justice was thereby empowered to order relief to any person at his discretion, but that supposition is quite unfounded. It does not vary the mode of giving relief, or give any new *description of persons a claim to it, but merely regulates the distribution of the money collected. If a justice, under that act, put a [*335 person on the collection list to receive money, it was necessary that he should be described as impotent. The 8 and 9 W. 3, c. 30, does not support the position for which it was cited on the other side. It certainly recites that persons are chargeable to the parish, "merely for want of work," but that has never been denied. Such persons are to have relief, but that must be given by finding them work, there is no power to give them money, without requiring work from them; and the legislature never seem to have contemplated any different mode of relief, whether the labour should prove profitable or not. The second section of that act is a clear legislative recognition of the principle now contended for. It is expressly stated that the enactment therein contained was made "to the end that the money raised only for the relief of such as are *as well impotent as poor* may not be misapplied and consumed by the idle, sturdy, and disorderly beggars." The 9 G. 1, c. 7, s. 1, also has been cited on the other side, but that only required that certain directions should be complied with before any poor person had relief; it did not alter the mode of giving relief, nor is there a single expression in it to justify the opinion that those able to work, but out of employment, were to receive pecuniary relief. One great object of the statute was the establishment of poor-houses for the "lodging, keeping, maintaining, *and employing* the poor." The 22 G. 3, c. 83, was made in *pari materia*: that authorized the union of different parishes for the purpose of better enabling the overseers of the poor to employ those out of work, and does not authorize the *administration of relief in any other mode. The 36 G. 3, c. 23, was [*336 merely intended to obviate the necessity of sending the distressed to the poor-house under all circumstances. The temporary distress there mentioned is such as might arise from frost or floods, or accidental causes of that nature, the termination of which could be fairly calculated upon, and clearly does not include the case of persons out of work, and who have not any prospect of obtaining employment.(a)

(a) There are several statutes earlier in point of time than the 43 Eliz., which throw some light upon the principal point discussed, but not decided, in this case, viz., whether the overseers of the poor are or are not justified in giving pecuniary relief to the able-bodied poor when out of employment, without setting them to work? An express power to give such relief to such persons certainly is not contained in any of those statutes; and when the various steps are examined by which the legislature gradually advanced from their first crude provisions:

ABBOTT, C. J. It does not appear upon the case before us that the overseers
 *337] of the poor considered *themselves bound to provide work for the unem-
 *338] ployed poor, if that were practicable; nor whether they in any way endea-
 voured to attain that object. Before we *determine whether the overseers
 were or were not justified in giving pecuniary relief to the unemployed

the more mature enactments of the 43 Eliz. c. 2, it appears that no such power was up to that time given by implication.

By the 22 H. 8, c. 12, s. 1, entitled "An act concerning the punishment of beggars and vagabonds," it was enacted, that the justices of the peace in all and singular the shires, &c., within the limits of their commissioners, shall from time to time make diligent search, and inquire of all *aged, poor, and impotent* persons which live, or of necessity be compelled to live, by alms of the charity of the people, and give them licenses to beg within certain limits. By sect. 2, impotent persons begging without licenses, were to be whipped and set in the stocks. By sect. 3, it was enacted, that "If any persons, being whole and mighty in body, and able to labour, be taken in begging; or if any, being whole and mighty in body, and able to labour, having no land or master, nor using any lawful merchandise, craft or mystery, whereby they might get their living, be vagrant, or can give no reckoning how they do lawfully get their living, they shall be taken to a justice of peace, and by him be ordered to be whipped, and after whipping, they shall be enjoined to repair to the place of their birth, or last abiding for three years, and there put themselves to labour, like as true men ought to do."

The 27 H. 8, c. 25, entitled "An act for punishment of sturdy vagabonds and beggars;" after reciting that no provision is made for the persons mentioned in the third section of the last-cited act after they get home, provides that the poor shall be supported by alms, so that they shall not be obliged to beg and wander about, and that all sturdy vagabonds and valiant beggars shall be caused and compelled to be set and kept to continual labour, in such wise that by their said labour they may get their own living; and sect. 4, provides that the churchwardens and two others of every parish shall collect alms in such good and discrete wise as the *poor, impotent, lame, feeble, sick, and diseased* people, being *not able to work*, may be provided, holpen, and relieved, so that in no wise they be suffered to go openly in begging; and that such as be lusty, or having their limbs strong enough to labour, may be daily kept in continual labour, whereby every one of them may get their own subsistence and living by their own hands.

The 1 Ed. 6, c. 3, entitled "An act for the punishment of vagabonds, and for the relief of the poor and impotent persons," in sect. 1, provides that, "If any man or woman, not being lame, impotent, or so aged or diseased with sickness, that he or she cannot work, not having lands, &c., whereon they may find sufficiently their living, shall either like a serving-man wanting a master, or like a beggar, be lurking in any house, or wandering by the highways, not applying themselves to some honest labour, nor offering themselves to labour with any that will take them, and if no one will otherwise take them, do not offer to work for meat and drink, they shall be taken for vagabonds. By sect. 9, after reciting that forasmuch as there are many maimed or otherwise lamed, sore, aged, and impotent persons which resort to the city of London, &c., begging, who, if they were separated, might easily be nourished in the places where they were born, it was enacted that the mayor, constables, and head officers of the cities, &c., to which such resort shall be, shall see all such idle, impotent, maimed, and aged persons, who otherwise cannot by their discretions be taken for vagabonds, which were born within the said cities, &c., or have resided there for three years, to be provided for. Sect. 10 provides for the removal of such as were not born in the place where found, nor had been conversant there for three years. Sect. 11 was as follows: "Provided always, that if any of the said aged, maimed, or impotent persons of the cities, towns, or villages where they were born in, or had their most abiding as aforesaid, be not so lame or impotent but that they may work in some manner of work, that then such town, parish, or village do either in common provide some such work for them as they may be occupied in, or appoint them to such as will find them work for meat and drink."

The 3 & 4 Ed. 6, c. 16, entitled "An act touching the punishment of vagabonds and other idle persons," repealed the 1 Ed. 6, c. 3, and revived the 22 H. 8, c. 12; but contained clauses 4, 5, and 6, corresponding to 9, 10, and 11, of the act repealed.

The 5 & 6 Ed. 6, c. 2, "For the provision and relief of the poor," has this preamble, "To the intent that valiant beggars, idle and loitering persons may be avoided, and the impotent, feeble, and lame provided for, which are poor in very deed;" and confirms 22 H. 8, c. 12, and 3 & 4 Ed. 6, c. 16. Sect. 2 enacts that a register shall be kept of all householders and inhabitants in each parish, and of such impotent, aged, and needy persons as are not able to live of themselves, nor with their own labour, that two collectors shall be appointed yearly, and that the collections shall be distributed to the poor in the same manner as was afterwards provided by the 5 Eliz. c. 3, (particularly noticed in the argument.)

The 2 & 3 Ph. & M. c. 5, was the next act on this subject. The preamble was the same as of the last-cited statute. By sect. 1, it confirmed the 22 H. 8, c. 12, and 3 & 4 Ed. 6, c. 16; and sect. 2 is similar to the same section of the 5 & 6 Ed. 6, c. 2. Sect. 7 provides, "That if it shall chance any parish to have in it more poor and impotent folks *not able to labour*, than the said parish is able to relieve, they may be licensed to beg elsewhere."

The effect of the 5 Eliz. c. 3, s. 1, the next statute in order, was shown in the argument. Sect. 10 provides for the giving of licenses to beg as before, but requires that the *infirmary* of the person shall be specified in the license.

poor, the case must go down to the sessions again, that we may be *informed whether any, and if any what endeavours were made to procure employment for them. All that the court can now say is, that undoubtedly it is the primary duty *of the overseers to find employment for the poor if possible. And I express that opinion now for the sake of the poor

The 14 Eliz. c. 5, "An act for the punishment of vagabonds, and for relief of the poor and impotent," repealed the 22 H. 8, c. 12, 3 & 4 Ed. 6, c. 16, and 5 Eliz. c. 3. Sect. 5 gives a definition of the persons who are to be intended to be rogues and vagabonds and sturdy beggars, and amongst others, includes "all common labourers, being persons *able in body*, using loitering, and refusing to work for such reasonable wages as is taxed, and commonly given in such parts where such persons do or shall happen to dwell." Sect. 16, after this preamble, "Forasmuch as charity would that poor, aged, and impotent persons should as necessarily be provided for as the said rogues and vagabonds and sturdy beggars repressed, and that the said aged, impotent, and poor people should have convenient habitations, &c., to settle themselves upon, to the end that they should not beg or wander about," provides for the keeping a register of the poor, finding habitations, paying money for their support by assessment, and for the appointment of overseers. Sect. 22 enacts "that, if any of the said aged and impotent persons, not being so diseased, lame, or impotent, but that they may work in some manner of work, shall be by the overseers of their said abiding-place appointed to work, if they refuse, then to be whipped and stocked for their first refusal, and for the second refusal, to be punished, as in case of vagabonds in the first degree of punishment;" (several degrees of punishment had been before provided for vagabonds.) Sect. 23 appears to be very important; it is as follows: "Provided always that three justices of the peace, whereof one to be of the quorum, of and with the surplusages of the said collections, &c., (the said poor and impotent people satisfied and provided for,) shall, by their discretions, in such convenient place and places within their shires as they shall think meet, place and settle to work the *rogues and vagabonds that shall be disposed to work*, born within their said counties, or there abiding for the most part within the said three years, there to be holden to work by the oversight of the said overseers, to get their livings, and be sustained *only* upon their labour and travail." Here, then, is the first clear legislative enactment for providing work for the able-bodied poor. Until this time, it seems to have been taken for granted, that all able-bodied persons could find employment if they pleased; and the very fact of their being out of work, and living by charity, made them, in the eye of the law, rogues and vagabonds, liable to be apprehended and punished. No relief of any kind was to be provided for them at the public expense; those enactments which ordered that they should be kept to hard labour, seem merely to have made it the duty of certain persons to see that they did continually work, as if it were assumed that employment could always be found. The last-mentioned statute, which enacted, that to a certain extent *women* should be provided, so far from authorizing the affording relief by money to such persons, expressly says, that "they are to get their livings, and to live and be sustained *only* upon their labour and travail." This was manifestly a very imperfect provision, and no reason for the enactment is distinctly stated, but it may be collected that some persons, apprehended as rogues and vagabonds, had expressed a willingness to work if they could find employment; for it speaks of the *rogues and vagabonds that shall be disposed to work*. This is rendered more clear by the 18 Eliz. c. 3, made to amend the former act, and entitled "An act for setting the poor on work, and for the avoiding of idleness." Sect. 4 runs thus, "Also to the intent, youth may be accustomed and brought up in labour and work, and then not like to grow to be idle rogues, and to the intent also that such as be already grown up in idleness, and *so* rogues at this present, may not have any just excuse in saying that they cannot get any service or work, and that other *poor and needy* (not impotent) persons, being willing to work, may be set on work. Be it enacted, that a competent store and stock of wool, hemp, &c., shall be provided, to be committed to the care of persons to be appointed collectors and governors of the poor, who are to dispose, order, and give rules for the division and manner of working the said stock, to the intent every such *poor and needy* person, old or young, able to do any work, standing in necessity of relief, shall not for want of work go abroad, either begging or committing pilferings, or other misdemeanors, *living in idleness*." It then goes on to provide that part of the stock shall be given to each poor person to be worked up, and that when he shall bring it back worked up, the overseers shall pay him *for his labour*, and sell the articles manufactured, and with the money coming of the sale, buy more stuff, &c. At the time when this statute was passed, the legislature appear to have been duly sensible of the mischief to be apprehended from suffering the poor to live in idleness, and, therefore, as humanity required that some provision should be made for those who were unable to maintain themselves, wisely enacted that such poor persons as were able to work should be compelled to do so, and be paid for their labour, and they made no provision for affording relief to such persons in any other mode. It does not appear to have been contemplated that any profit would be acquired by the labour of persons so employed; for the act does not say that any part of the money produced by the sale of the manufactured articles shall be applied to reimburse the parish, the moneys paid to the labourers, but merely that, with the money coming of such sale, more stuff shall be bought for the purpose of being manufactured. Thus the law remained until the passing of the 39 & 40 Eliz. c. 3, which it is unnecessary to notice, as all the provisions of it are embodied in the 43 Eliz. c. 2. It appears by Lambard's *Eirenarcha*, chap. 7, p. 206, that soon after the passing of the latter statute, certain resolutions, commonly ascribed to her majesty's justices at Westminster, were pretty generally known, and considered as tending to the right execution of the law.

- *341] themselves, to whom no greater kindness can *be done than by enabling them to earn their own living by labour, instead of suffering them to eat the bread of *idleness, by which their habits and morals must soon be corrupted.
- *342]

Case sent back to sessions.

The eighth and ninth resolutions are applicable to the present question. "If the parents be able to work, and may have work, they are to find their children by their labour, and not the parish; but if they be overburthened with children, it shall be a very good way to procure some of them to be placed apprentices according to the statute." "No man is to be put out of the town where he dwelleth, nor to be sent to their place of birth (or last habitation) but a vagrant rogue, nor to be found by the town, *except the party be impotent*, but ought to set themselves to labour, if they be able and can get work; if they cannot, the overseers must set them to labour." There is not in any of those resolutions (twenty in number) any recognition of a power in the overseers to give relief to able-bodied persons, otherwise than by finding them employment. Whether any subsequent statute has altered the law on this subject, or whether the opinion above suggested, as to the effect of the earlier statutes, be or be not correct, remains to be decided whenever this important question shall be distinctly brought before the court.

In Strype's Annals of Church and State, under Queen Eliz. b. 2, p. 90, there is a letter, which was addressed to Lord Treasurer Burghley by a justice of peace for the county of Somerset, which shows that the great evils arising from habits of idleness amongst the poor, began then to be understood, and strengthens the idea that one great object of the legislative provisions for the poor made about that time, was to prevent able-bodied men from being unemployed. After observing upon the great increase of crime, and the number of wandering, idle vagabonds then committing depredations in that part of the country, the writer proceeds, "And when these lewd people are committed to the jail, the poor country that is robbed by them are forced to feed them, which they grieve at. And this year there hath been disbursed to the relief of the prisoners in the jail 73*l.*, and yet they allowed but 6*d.* a man weekly. And if they were not delivered at every quarter sessions, so much more would not serve, nor two such jails would hold them. But if this money might be employed to build some houses adjoining to the jail for them to work in, and every prisoner, committed for any cause, and not able to relieve himself, compelled to work, and as many of them as are delivered upon their trials, either by the acquittal of the grand jury or petty jury, burning in the hand or whipping, presently transferred thence to the houses of correction to be kept in work, except some present will take any into service; I dare presume to say the tenth felony will not be committed that now is." This letter also shows that at that time prisoners committed for trial, although they could not be compelled, and were not willing to work, were in point of fact in some places supported at the expense of the public. It seems, however, that they could not legally claim to be so maintained. See the case of *The Justices of the North Riding of Yorkshire*, ante, 286.

BURDOM v. BROCKRIDGE.

Where a prisoner is charged in execution, it is not sufficient for the plaintiff's attorney to file the committitur piece in due time with the clerk of the dockets, he must also see that the latter enters it on the judgment-roll within the time prescribed by R., E. T. 41 G. 3; and if that be not done, the prisoner is entitled to be discharged.

A RULE was obtained for discharging the defendant out of custody, on the ground that the committitur on the judgment was not entered on the judgment-roll within the time limited by the rule of court, made in Easter term, 41 G. 3, viz.: "that from and after the first day of Trinity term next, every committitur on every judgment, obtained or to be obtained in this court, against any prisoner or prisoners shall be filed with the clerk of the dockets of this court, on or before the last day of the term in which such prisoner or prisoners is or are to be charged in execution; and the clerk of the dockets shall enter such committitur on the judgment-roll within four days next after the end of such term, exclusive of the last day of the term, unless the last of such four days be Sunday, *343] and in that *case within five days next after the end of such term; and that in default thereof such prisoner or prisoners shall be entitled to be discharged." It appeared that a verdict was recovered by the plaintiff against the defendant at the London sittings before Hilary term last. In Hilary term he was rendered in discharge of his bail, and in Easter term charged in execution in this action, by rule of court, on an acknowledgment by the marshal that he was then in his custody. No committitur was entered on the judgment-roll until after the end of Trinity term.

Rotch showed cause upon an affidavit that the committitur piece was filed with the clerk of the dockets seven days before the end of Easter term, and contended that the plaintiff's attorney had thereby done all that he was bound to do. It was in consequence of the neglect of the clerk of the dockets, the officer of the court, that the committitur was not duly entered on the judgment-roll; the plaintiff, therefore, ought not to be prejudiced by that neglect.

Archbold, contra, contended that although it was the duty of the clerk of the dockets to enter the committitur on the roll, yet the plaintiff's attorney was bound to see it done.

Per Curiam. This is not a case in which the court can exercise their discretion. It is clearly within the rule referred to, and the prisoner must be discharged.

Rule absolute.

*KING'S BENCH PRISON.

[*344]

Prisoners confined in the Marshalsea detected in playing at hazard, punished by the court.

THE solicitor-general had obtained a rule for James Stephens, Edward Corbet, and several other persons, prisoners in the King's Bench prison, to be brought up to answer the matters of an affidavit; and also to show cause why some of them should not be removed to some other prison. The rule was obtained upon the affidavit of the marshal and two of the turnkeys, in which it was stated that the former had received information that a gaming-table was kept in one of the rooms of the prison, and that hazard was generally played there from midnight till six o'clock in the morning, and that the two turnkeys detected the several persons named in the affidavit in the act of playing at dice about one o'clock in the morning of the 16th November, in the room of Stephens. The prisoners now being brought into court in the custody of the marshal, by virtue of the rule, the court adjudged, that for the offence mentioned in the affidavit, Stephens should be confined alone in the strong-room in the King's Bench prison for one month; and that, as to all the other prisoners but one, who had since been discharged under the insolvent act, they should not be allowed the rules of the prison for one month; and that the prisoner so discharged should give security by his recognisance for 40*l*. for his good behaviour for six months.

Note. The court have on former occasions exercised a similar power over prisoners confined in the King's Bench prison. In 1779, Phillips, the chief justice of a self-created court in the prison, who was charged in execution, was committed to the county jail. In 1780, one Richardson had been ringleader of riots in the prison, and of an assault on one of the prisoners. [*345] On motion being made to remove him to the county jail of the sheriff of Surrey, it was doubted whether the court could change the custody of a prisoner for a civil debt. The prison having been destroyed by fire in June that year, the matter dropped. In Easter term, 1782, a court of mayor and aldermen having been set up in the prison, and it being shown upon affidavit that they had executed orders made at the court with great violence, the court ordered the prisoners to come up on a subsequent day, and show cause why they should not be committed to the county jail, or kept in close custody of the marshal. The late mayor, the present mayor, the four aldermen, the secretary, the two criers, and the constable, having appeared in court, the court ordered the late mayor and secretary to be committed to the new prison till the fourth day of the ensuing term, and the then mayor to be confined in one of the strong-rooms in the King's Bench prison, singly and by himself, for a fortnight; the two criers to be confined in another strong-room till the fourth day of term. In Michaelmas term, 1783, upon complaint upon affidavit of a riot by Nowell and others in the lobby, calling themselves "liberty boys," after being called upon to answer the matters of the affidavit, two of them were ordered to be confined in the strong-room for a fortnight.

RHODES v. HAIGH and Another.

Upon the trial of an action on the case relating to the right of using a stream of water, a verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom all matters

in difference were referred, with liberty to the arbitrator to regulate future enjoyment of the stream. One of the parties to the cause having died before any award was made, it was held that his death determined the arbitrator's authority, and an award made subsequently was set aside.

THIS was an action brought to try the right to a watercourse, and the mode of using a stream of water. By an order of *nisi prius* made at the Summer assizes, 1822, for the county of York, a verdict was taken for the plaintiff for 500*l.* damages and 40*s.* costs, subject to the award of J. W., to whom all matters in difference between the parties were thereby referred, with power to order a nonsuit or a verdict for the defendant, and to regulate the future enjoyment, according to the rights of the parties. The plaintiff in the cause died on the 15th December, 1822, and the award was not made until the 5th day of February, 1823, a rule *nisi* for setting aside the award having been obtained, on the ground
 *346] that "the death of the party before the award was a revocation of the submission. *Toussaint v. Hartop*, 1 B. Moore, 287; *Cooper v. Johnson*, 2 B. & A. 394.

F. Pollock now showed cause. The death of one of the parties before the award was made was not a revocation of the arbitrator's authority, because here a verdict was taken at the trial for a certain sum, subject to the award of an arbitrator, and the sum afterwards awarded is to be taken as if it had been originally found by the jury. The plaintiff is then entitled to enter up judgment for the amount, without first applying to the court for leave to do so. The award is substituted for the verdict of the jury, and gives the party the benefit of the statute 17 Car. 2, c. 8, by which it is enacted, that "the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." Here the judgment would have been entered in Hilary term, 1823, if the plaintiff had not obtained the present rule. Here, indeed, something besides the cause was referred, but the award, notwithstanding, will be good as far as it determines the cause. [BAYLEY, J.(a) The death of any of the parties is in general a revocation of an arbitrator's power; but where the submission is by order of *nisi prius*, and a verdict is taken which the arbitrator is to alter as he thinks fit; if nothing is submitted which the verdict and the judgment thereon will not embrace, the death will be no revocation. If any thing is submitted which the verdict and judgment will not embrace, it will be a revocation of the whole, because as to that
 *347] which the verdict and *judgment will not embrace, the arbitrator cannot proceed; and if he cannot proceed upon all the matters submitted, he cannot proceed upon any. That was decided in *Bower v. Taylor*, Easter term, 1816. Verdicts were taken in a replevin cause and in an action of *assumpsit*, subject to a reference, the costs of the causes to abide the event, and the costs of the reference to be in the arbitrator's discretion. Taylor died before the award made, but the arbitrator proceeded and ordered the verdict to be entered for the defendants in both causes, and plaintiff to pay the costs of the reference. A rule *nisi* was obtained to set aside the award, and it was urged, that the plaintiff might have wished to examine Taylor. ABBOTT, J., observed, that upon affidavits that he so intended, it might have furnished a special ground for vacating the award; but the master having stated that the costs of the reference would be included in the judgment, the court held that the death did not prevent the arbitrator's proceeding. Rule discharged. HOLROYD, J., thought no submission by order of *nisi prius* revocable.]

ABBOTT, C. J. This case falls within the principle laid down in *Bower v. Taylor*; for here all matters in difference are referred, and the arbitrator has a power to regulate the future enjoyment of the stream. The verdict and judgment would not embrace either of those matters. Since the decision of that case,

(a) The learned judge read from a manuscript the whole of the matter contained between the brackets.

it was held by this court, in *Cooper v. Johnson*, where the cause only had been referred, that the death of either party determined the arbitrator's authority. I am, therefore, clearly of opinion, that the rule for setting aside the award must be made absolute.

Rule absolute.

Littledale and *Alderson* were to have argued in support of the rule.

*HIGGINS v. SARGENT, Esq., and Others.

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In covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A.

COVENANT upon a policy of assurance, bearing date the 10th March, 1819, by which the defendants covenanted to pay to the plaintiff 4000*l.* at the expiration of six months after due proof of the death of R. C. Burton. The cause was tried before BAYLEY, J., at the last assizes for the county of York; and the principal question was, whether R. C. Burton's life was an insurable life at the time when the policy was effected. The learned judge summed up the evidence to the jury with reference to that question, no point having been then made as to interest; but when the jury returned a general verdict for the plaintiff, his counsel then claimed to have interest allowed upon the principal sum insured, from the time when that sum became due. It was now stated in the affidavits that R. C. Burton died in April, 1821, and that due proof of his death was given to the defendants, so that the principal sum insured became due on the 6th November, 1822, and that the interest upon that sum to the first day of Michaelmas term, 1823, amounted to 200*l.* A rule nisi having been obtained for increasing the damages to 1200*l.*,

J. Williams, F. Pollock and *Holt* now showed cause. The plaintiffs can only recover interest by way of damages for detention of the debt; it was not claimed until the jury had returned their verdict, and it was a question for them. It is clear that a party is not *entitled to recover interest in all cases, from the time when a specific sum becomes payable; *Gordon v. Swan*, 12 East, 410. There, copper was sold at so much per ton, payable at six months; and after argument, the court held, that the vendor was not entitled to interest from the expiration of the credit.

Scarlett and *D. F. Jones*, contra. In *Blaney v. Hendricks*, 2 Bl. Rep. 761, it was held, that interest is due on all liquidated sums from the time when the principal becomes due and payable. [ABBOTT, C. J. That case has been long overruled.] The money in this case became due upon a specialty, and therefore ought to carry interest. It is true that interest is not due for rent in arrear, because the landlord has in his power the means of recovering his rent, viz., by distress and sale. But interest is due upon a specialty-debt, and also upon bills of exchange and promissory notes which are not specialties. If goods be sold to be paid for at the end of a month by a bill having two months to run, and a bill is not given, interest is due from the time of the expiration of the credit. And if so, why should not interest be payable if the contract were to pay the money at the same time as it would have been payable if a bill had been given.

ABBOTT, C. J. It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It is of importance that this rule should *be adhered to; and if we were to hold that interest was payable in this case, the application of the general rule might be brought into discussion in many others. Interest was not claimed by the

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plaintiff's counsel in this case until the judge had concluded his address to the jury upon the principal question for their consideration, and they had pronounced their verdict upon that question in favour of the plaintiff. It was then contended for the first time, that the plaintiff was entitled to have interest allowed him upon the principal sum, secured by the policy, from the time when it had become payable; and that point was reserved by the learned judge. The only question upon the present rule is, whether the jury ought to have been told that they were bound by law to give the plaintiff interest from that time; for if it was a matter for their discretion only, and it was not properly submitted to them, that may be a ground for granting a new trial, but not for increasing the damages. Inasmuch as the money recovered in this cause was not due by virtue of a mercantile instrument, and as there was no contract express or implied on the part of the defendant to pay interest, I cannot say that the jury ought to have been told that they were bound to give interest. That being so, this rule for increasing the damages must be discharged.

BAFLEY, J. I am of the same opinion. It was once the opinion, that money lent carried interest, and in *Calton v. Bragg*, 15 East, 224, it was so contended, on the ground that the lender would otherwise, for the accommodation of the
 *351] borrower, lose the benefit which he might make of his capital; and that the lender ought, in equity, to be put in the same situation as if he had applied his principal to his own use. But this court held, that interest was not due by law for money lent without a contract for it expressed, or to be implied from the usage of trade or from special circumstances. Now, if interest be not due for money lent which is to be repaid either upon demand or at a given time, it follows, that it is not due for money payable within a certain time after due proof of the happening of a particular event. The circumstance of the money having become due in this case by virtue of a contract under seal, does not make any difference. If it were the intention of the parties that the principal sum should bear interest from the time when it became due, that might have been expressly provided for in the deed, but not having been done, the law will not imply a contract on the part of the defendants to pay interest; and, consequently, the jury ought not to have been directed to give interest.

HOLROYD, J. I think that the judge would not have been warranted in directing the jury to give interest in this case. It is clearly established by the later authorities, that unless interest be payable by the consent of the parties express, or implied from the usage of trade (as in the case of bills of exchange) or other circumstances, it is not due by common law. In *De Haviland v. Bowerbank*, 1 Campb. 50, Lord ELLENBOROUGH was of opinion, that where money of the plaintiff had come to the hands of the defendant, to establish a right to interest upon it, there should either be a specific agreement to that
 *352] effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used; and in *Gordon v. Swan*, 12 East, 410, the same noble and learned judge said, that the giving of interest should be limited to bills of exchange, and such like instruments and agreements reserving interest. In the latter case, although the money was payable at a particular day, non-payment at that day was held not to give any right to interest. Independently of these authorities, I am of opinion upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now, in that action the defendant was summoned to render the debt, or show cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If this, therefore, had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages resulting from the non-payment of the debt. Where, indeed, the interest becomes

payable by virtue of a contract express or implied, then it becomes part of the debt itself, and consequently it would then be no answer to an action of debt for the defendant to show that he had paid the principal sum advanced. Here, there being no contract either express or implied to pay interest, it was no part of the debt, but could only be recovered by way of damages for detaining the debt. Inasmuch, therefore, as it appears, that if the plaintiff had pursued that remedy which *by the common law is specifically applicable to his [*353 case, he could not have recovered interest, I think that he ought not to be permitted to recover interest by way of damages in an action of covenant. I cannot therefore say that the jury ought to have given interest in this case, and I doubt much whether the verdict could have been supported if they had done so.

Rule discharged.

TAYLOR v. WATERS.

The *third* proclamation required by the 31 Eliz. c. 3, must be made one month at the least before the quinto exactus. If it be not so made, the court will reverse the outlawry. *Quare*, Whether such reversal is for want of proclamations within the meaning of the 31 Eliz. c. 3, or for irregularity.

THIS was a rule calling upon the plaintiff to show cause why the outlawry should not be set aside for irregularity, and it was referred to the master to inquire and report, who, at the sittings after last Trinity term, reported as follows: "It appeared that the exigent issued 23d March, tested 12th February preceding, and returnable 17th May. Between the teste and return there were four days of exaction, 25th February, 4th March, 22d April, 6th May. It was objected that as the first two of these days were previous to the issuing of the writ, though within the period of teste and return, the proceedings were irregular; but I find that according to established usage and practice this is considered sufficient; there having been the proper number of exaction days between the teste and return, and the form of exaction being only general, and applicable to all causes without naming them. On the 30th May an allocatur exigent issued, tested the preceding 20th, and this 20th was also a general exaction day, making the quinto exactus, and, according to the practice, this seems also sufficient. But a more doubtful question *arises as to the proclamations. A writ [*354 of proclamation issued as the original exigent did, viz., 23d March, tested 12th Feb. preceding, and returnable 17th May, (which was regular,) and proclamations were made under it on 4th April, 15th April, (at the quarter sessions,) and the second of May. Now the statute 31 Eliz. c. 3, directs, 'that the sheriff shall make three proclamations in this form following, and not otherwise, namely, *one* in the open county court, *one other* at the general quarter sessions of the peace, and *one other* one month at the least before the quinto exactus.' If the expression *one other*, lastly used, is to be construed as the *third* or the last, then there has not been a month between that proclamation and the quinto exactus 20th May; and the outlawry is bad, but if the expression *one other* may refer to either of the former, then there has been a month, and the proceedings are sufficiently regular."

Per Curiam. The *third* proclamation should have been made one month at the least before the quinto exactus; and as it appears that the proclamation was not duly made, the outlawry must be reversed, and being reversed for irregularity the defendant is not under the necessity of giving bail.

In Michaelmas term, the *Solicitor-General*, on behalf of the plaintiff, mentioned the case again, and insisted that he was entitled to have bail by the 31 Eliz. c. 3, s. 3, which enacted "That before the reversing of any outlawry, through or by *want of any proclamation* to be had or made according to the form of that act, the defendant in the original action shall *put in bail*, not only

*355] to appear and answer to the plaintiff in "the former suit, in a new action, to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next, after the avoiding of the outlawry." Now, in this case, the outlawry is to be reversed for want of making proclamations according to the form of that act, and, therefore, by the very words of it, the defendant must put in bail.

Marryat, contra. The outlawry is not in this case reversed for want of proclamations within the meaning of the 31 Eliz. c. 3, but for an irregularity in the proceedings. It appears by the report that the proper number of proclamations was made, but that one of them was irregularly made, this is not, therefore, a case in which bail can be required.

ABBOTT, C. J. It appears to me that if the proclamation was not made according to the form prescribed by the statute, it was in law no proclamation at all. If it is to be considered in that point of view, then the outlawry must be reversed for want of proclamations; and the statute requires that in such cases bail shall be given. But if, as contended for the defendant, it was an irregularity in the proceedings, the court may, in their discretion, order bail to be given on a reversal for such cause. Let the outlawry, therefore, be reversed, the defendant putting in special bail to the action in the common form.

Rule absolute on those terms.(a)

(a) Bail was accordingly given in the alternative, and not absolutely to satisfy the condemnation. From the mode of taking bail in this case, it would appear that the outlawry was reversed, *356] not for want of "proclamations, under the 31 Eliz. c. 3, but for irregularity; for it does not appear that the court can exercise any discretion as to the mode in which bail is to be given in the former case, the statute requires it to be given absolutely to satisfy the condemnation; and in this instance it was given in the form usually adopted, where bail is ordered by the court exercising the discretion vested in them by the 4 & 5 W. & M. c. 18. See *Serecold v. Hampson*, 2 Str. 1178, 12 East, 624, n.; *Matthews v. Gibson*, 8 East, 527; *Havelock v. Geddes*, 12 East, 622; *Hesser v. Wood*, 4 Taunt. 691; *Graham v. Grill*, 1 M. & S. 409 *Graham v. Henry*, 1 B. & A. 131.

*Between ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, FRANCIS LIND, and JOHN HUDSON MAY, Plaintiffs; and the Honourable CHARLES CECIL POPE JENKINSON, the Honourable HENRY KING, the Reverend JOHN MITCHEL, JOHN CUTHBERTSON, MARIA BARNARD, ALEXANDER HUME EVELYN, JOHN BYDE, GEORGE BARNARD, CHARLES MURTHWAITE, and HENRY WOODCOCK, Defendants.

And between GEORGE BARNARD, an Infant, by FREDERICK AUGUSTA BARNARD his Grandfather and next Friend, Plaintiff; and ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, MARIA BARNARD, FRANCIS LIND, JOHN HUDSON MAY, JOHN CUTHBERTSON, CHARLES MURTHWAITE, ALEXANDER EVELYN, JOHN BYDE, HENRY WOODCOCK, the Honourable CHARLES CECIL POPE JENKINSON, the Honourable HENRY KING, and the Reverend JOHN MITCHEL, Defendants.

And also between ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, FRANCIS LIND and JOHN HUDSON MAY, Plaintiffs; and the Honourable CHARLES CECIL POPE JENKINSON, and Sir HERBERT TAYLOR, Defendants.

And also between ELIZABETH MURTHWAITE, JOHN MACPHERSON and CHARLOTTE his Wife, FRANCIS LIND, and JOHN HUDSON MAY, Plaintiffs; and GEORGE IRTON MURTHWAITE, and JANE CUTHBERTSON, Defendants. [*358 (a)]

A., by will duly executed to pass real estates, devised and bequeathed to trustees, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every his freehold, copyhold, and leasehold estates, and all his personal estate and effects whatsoever and wheresoever, in trust to pay thereout the several legacies and annuities therein by him given and bequeathed, and for other purposes in the will mentioned. The testator then gave legacies and annuities to a considerable amount; and directed that the annuities should be chargeable upon his 26,400*l.* in the 3 per cent. consolidated annuities. It was stated in the case that a large surplus remained after paying debts, legacies, and annuities; but it was not stated that the legacies were actually paid, or that the annuitants were dead: After the legacies and annuities, the testator proceeded, "All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seized or possessed of, interested in, or entitled to, at the time of my decease, I do give, devise, and bequeath unto my three nieces, E. M., M. M., and C. M., equally to be divided between them, *share and share alike, for and during the term of their natural lives.* And from and after the decease of them or either of them, it is my will that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue of such rents, issues, dividends, and profits *for life in like manner.* And if either of my nieces shall happen to die in the lifetime of the others or other of them without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid, shall go to, and be shared and divided equally between, the survivors of my nieces for their respective lives, and afterwards by the lawful issue of the survivors of my nieces in like manner. And if all my nieces and their issue, save one, shall die without issue lawfully begotten, then such surviving niece shall have and enjoy the whole of the rents, &c., of such residue of my estate and effects for and during the term of her natural life. And from and after her decease, the lawful issue of such surviving niece (if more than one) shall have the whole of the rents, &c., equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part thereof as is personal, to and for his or her own use and benefit; and to hold so much and such part or parts thereof as are freehold, to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint tenants; and if but one, then to such one, his or her heirs and assigns for ever. And if all my nieces shall die without issue, then from and after the decease of the survivor of them my nieces without issue as aforesaid, I give the whole of such residue to my next male heir of the name of Murthwaite, to hold

(a) Pursuant to his majesty's warrant, issued ten days before the end of Michaelmas term three of the judges of this court sat, as on former occasions, on Tuesday, the 13th of January, and the following days, and decided this and the several following cases. On the 22d, the lord chief justice sat with the other three judges; and on one of the preceding days he also presided (Best, J., sitting at nisi prius).

to him, his heirs, executors, and administrators, in manner aforesaid." Two of the trustees were dead. All the nieces were still living, two of them had no children, the other had one child, a son, G. B.

Held, first, that J. C., the surviving trustee, now has a fee-simple in the freehold estates, and an absolute interest in the leasehold.

Secondly, that the testator's three nieces took no legal estate under the will.

Thirdly, that G. B. took no estate under the will.

Fourthly, supposing that the will had commenced with the words "all the rents," &c., and the passage before those words had been omitted, the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold.

Fifthly, that G. B. would have no estate in the freehold or leasehold tenements; but should he survive the three nieces, and neither of them should have any other child, he would be tenant in tail of the freehold, but have no interest in the leasehold estates. Should he die in the lifetime of the three nieces, he would die seized of no freehold, nor possessed of any leasehold estate.

THIS case was sent by the lord chancellor for the opinion of this court. Thomas Murthwaite, late of Smallberry Green, within the parish of Isleworth, *359] in the county of Middlesex, Esq., the testator hereinafter named, was, at the times of making his will and of his death, seised in fee-simple of freehold tenements, and seised in fee-simple of some copyhold tenements, which he duly surrendered to the use of his will; and was also possessed of several leasehold estates for years, and of other personal estate of different descriptions, to a very considerable amount. And the said Thomas Murthwaite duly made and executed his last will and testament, in writing, bearing date the 29th of December, 1806, and which was duly executed and attested, so as to pass freehold estates, and was as follows: "I give, devise, and bequeath to Mrs. Margaret Murthwaite, of Twickenham, in the county of Middlesex, widow, Mr. John Cuthbertson, of Poland street, in the said county of Middlesex, and to Mr. John Janes, of the Inner Temple, London, gentleman, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every my freehold, copyhold, and leasehold estate, and my personal estate and effects whatsoever, and wheresoever situate, lying, and being, whether the same consists of mortgage, money in the public funds or stocks, bonds, notes of hand, or other securities, and all other my real and personal estate and effects of what nature or kind soever, not hereinafter by me specifically bequeathed, upon the trusts, and to and for the uses, ends, intents, and purposes hereinafter expressed, mentioned, and declared of and concerning the same; *360] that is to say, in trust to pay thereout the several legacies and annuities herein by me given and bequeathed, and for other the purposes in this my will mentioned." The testator then gave annuities to several persons for their respective lives, to the amount of 440*l.* per annum; and proceeded: "All which before-mentioned annuities I hereby will, order, and direct, shall be chargeable upon and payable out of my twenty-six thousand and four hundred pounds three per cent. consolidated bank annuities, or such sum as may be standing in that fund in my name at the time of my decease." The will then contained bequests of legacies to a considerable amount, and then was as follows: "All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seized or possessed of, interested in, or in any way entitled unto at the time of my decease, I do hereby give, devise, and bequeath unto my three nieces, Elizabeth Murthwaite, Maria Murthwaite, and Charlotte Murthwaite, daughters of my late brother, the Reverend Peter Murthwaite, late of Ipsden, in Oxfordshire, equally to be divided between them, share and share alike, for and during the term of their respective natural lives; subject, nevertheless, to such provision as is hereinafter provided touching and concerning the house and premises now in my occupation. And from and after the decease of them, or either of them, it is my will and meaning, that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue

of such rents, issues, dividends, and profits, for life, in like manner; and it is my further will and meaning, *that if either of my said nieces shall happen to die in the lifetime of the others or other of them, without issue [*361 of her body lawfully begotten, that the share of her so dying without issue as aforesaid, shall go to and be shared and divided equally between the survivors of my said nieces for their respective lives, and afterwards by the lawful issue of the survivors of my said nieces in like manner. And if all my said nieces and their issue, save one, shall die without issue lawfully begotten, then it is my will and meaning, that such surviving niece shall have and enjoy the whole of the rents, issues, dividends, interest, and profits of such residue and remainder of my estate and effects for and during the term of her natural life; and from and after her decease, it is my further will and meaning, and I do hereby will, order, and direct, that the lawful issue of such surviving niece, (if more than one,) shall have and enjoy the whole of the rents, issues, dividends, interest, and profits of all such residue of my estate and effects, equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part thereof as is personal, to and for his or her own use and benefit; and to hold so much and such part and parts thereof as are freehold to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint tenants; and if but one, then to such only one, his or her heirs and assigns for ever; and to hold so much and such parts thereof as is and are copyhold, at the will of the lord or lords, lady or ladies of the manor or manors of which the same are holden in like manner. And if all my said nieces shall die without issue, then from and *after [*362 the decease of the survivor of them my said nieces without issue as aforesaid, I do hereby give, devise, and bequeath the whole of such residue and remainder of my estate and effects, as well real as personal, and as well freehold as copyhold, to my next male heir of the name of Murthwaite; to hold to such male heir, his heirs, executors, and administrators in manner aforesaid." The testator then, after reciting that his house was leasehold, and that the said Margaret Murthwaite and his three nieces might not choose to live together, or to occupy his house, devised the same to them or such of them as should be living at his decease; but if it should happen that they did not agree to live together, he directed that the house and furniture should be sold, and disposed of by the trustees thereinbefore named, or the survivors; and that the money to arise by such sale should be divided equally amongst the said Margaret Murthwaite and his said three nieces, or such of them as should be living at the time of his decease, and the lawful issue of them as should be dead, if any, for their use and benefit. Then followed clauses appointing executors, and relating to other matters not important to this case.

The testator died on the 23d day of November, 1808, without having revoked or altered the said will, and leaving his said three nieces, the plaintiff Elizabeth Murthwaite, the defendant Maria Barnard, then Maria Murthwaite, and the plaintiff Charlotte Macpherson, then Charlotte Murthwaite, and the said Margaret Murthwaite, John Cuthbertson, and John Janes, him surviving. And the said testator left his said three nieces his heirs at law, and likewise his customary heirs. Margaret Murthwaite, John Cuthbertson, and *John Janes [*363 proved the said will of the said testator. Maria Barnard, then Maria Murthwaite, some time in the year 1809 intermarried with George Barnard, but who departed this life on the 5th day of October, 1817, leaving Maria, his wife, surviving; and there was issue of the said marriage between them only one child, viz., George Barnard. John Janes, one of the executors and trustees of the said testator, died in the year 1814, leaving Margaret Murthwaite and John Cuthbertson, his co-trustees and co-executors, him surviving; and the said Margaret Murthwaite died some time in the year 1816, intestate, leaving the said John Cuthbertson, and also her said daughters, Elizabeth Murthwaite,

Maria Barnard, and Charlotte Macpherson surviving her. A very large surplus of the testator's personal estate and effects remains after paying his funeral and testamentary expenses, and his debts, and the legacies and annuities bequeathed by him. The defendant George Irton Murthwaite would now be the next male heir of the said testator, of the name of Murthwaite, in case the said Elizabeth Murthwaite, Charlotte Macpherson, and Maria Barnard were now dead without leaving issue. The questions for the consideration of the court are,

First, what estate and interest the said John Cuthbertson, the surviving trustee, now has under the said will of the said testator, in the freehold and leasehold tenements respectively devised and bequeathed unto the said Margaret Murthwaite, John Cuthbertson, and John Janes, as aforesaid.

Secondly, what estates the said testator's said three nieces, Elizabeth Murthwaite, Maria Barnard, and *Charlotte Macpherson, respectively took
*364] under the said will of the said testator, in the said freehold and leasehold tenements respectively.

Thirdly, whether the said George Barnard now has any and what estate in the said freehold and leasehold tenements respectively, and what estate he will have in the said freehold and leasehold tenements respectively, in case he shall be the only issue of the said three nieces living at the death of the survivor of them, no other issue having been born; and in case the said George Barnard should now die, in the lifetime of the said three nieces of the said testator, what estate would he die seised and possessed of in the said freehold and leasehold tenements respectively.

And in case the court shall be of opinion, that by the will, as above stated, the whole legal estate in fee-simple, in the said freehold tenements, and the absolute interest in the said leasehold tenements, is now vested in John Cuthbertson; then, in case the will had commenced with these words, "all the rents, &c." and the passage before these words had been omitted,

Fourthly, what estate the said testator's three nieces, Elizabeth Murthwaite, Maria Barnard, and Charlotte Macpherson would respectively have taken under the said will of the testator, in the said freehold and leasehold tenements respectively; and,

Fifthly, whether the said George Barnard would now have any and what estate in the said freehold and leasehold tenements respectively, and what estate he would have in the said freehold and leasehold tenements respectively, in case he shall be the only issue of the said three nieces living at the death of the survivor of them, *no other issue having been born; and in case the said
*365] George Barnard should now die, in the lifetime of the said three nieces of the said testator, what estate would he die seised and possessed of in the said freehold and leasehold tenements respectively.

This case was argued in the course of the last term, by

Tindal, for Elizabeth Murthwaite, John Macpherson and Charlotte his wife. To the first question proposed, the court must answer, that John Cuthbertson, the surviving trustee, hath not now any estate under the will of the testator; to the second, that the three nieces took legal estates in tail, with cross-remainders in tail, in the freehold, and absolute estates in the leasehold; to the third, that George Barnard has not now any estate in the said freehold and leasehold tenements, or either of them; but, if he survives his mother and aunts, they having had no other issue, or leaving no other issue, he will take an estate tail in the whole freehold by descent from his mother. If this view of the case be correct, the other questions do not arise. The material clauses of the will are, first, the devise to the trustees; secondly, the charge of the legacies and annuities on the stock; thirdly, the devise to the nieces, and the provisions for different cases of survivorship; and, lastly, the ultimate remainder over, on failure of issue of the nieces generally. In deciding the first question, the court must not confine themselves to the clause devising to the trustees. The words of that clause are

certainly large enough to comprehend the whole property, both real and personal; but looking at the whole will, it is plain that the devise to the trustees was merely for the payment of debts and *legacies; and that the testator intended the personal property to be first applied to those purposes, and [366 that the real estate should not be so applied if that were unnecessary. The annuities are expressly made chargeable in the first instance on the stock; the direction to the trustees is, *to pay* the legacies and annuities out of the funds left to them. There is no direction for them to sell, or convert into money, any part of the real estate, nor in the devise of the residue does the testator mention it as property already given to the trustees. He gives it directly to his nieces, and does not provide that the trustees shall hold in trust for them. There is no devise to the use of the trustees, and therefore nothing to prevent the use being executed in the persons beneficially entitled, after payment of the debts and legacies. It must therefore be inferred, that the testator intended to devise the real property to the trustees, only in case the personal should prove insufficient; and if a devise to that effect would be good if express, it may also be good when implied. The court will not allow the trustees to take more than, or beyond what, is sufficient for the purposes of the trust. *Doe dem. Player v. Nicholls*, 1 B. & C. 336. Here it is found, that a large surplus of the testator's personal estate and effects remains after paying the debts, legacies, and annuities, and, therefore, the surviving trustee hath not now any estate in the freehold or leasehold tenements. The second, however, is the main question, as it is a matter of indifference to the plaintiffs whether the surviving trustee has or has not any estate, if the court shall be of opinion that the *testator's nieces take [367 estates in tail. It should be premised, that the devise to them is sufficient to carry the lands and funds, although it does not do so in terms, for an indefinite devise of rents will pass the land itself; and it is equally well established, that an indefinite bequest of dividends, interest, or produce, will pass the capital. *Page v. Leapingwell*, 18 Ves. 463; *Stretch v. Watkins*, 1 Madd. 253; *Earl of Chatham v. Daw*, 6 Br. P. C. 450; *Butterfield v. Butterfield*, 1 Ves. sen. 133. The residuary devise is therefore the same in its result as if the lands and effects had been given, and not merely the rents and dividends. As to the main point, it must be admitted on the other side, that express estates for life are given to the testator's three nieces; and that the ultimate remainder over is not given until after an indefinite failure of the issue of the nieces. The prevailing intention, therefore, appears to have been, that the estate should not pass from the families of the first takers until an indefinite failure of their issue; and the court must give effect to the main intent, although by so doing they may defeat some minor intent. It is a general rule of law, that if a testator gives an estate to the first taker, whether for life, or uses words which show an intention that he should take a fee, yet if there be also an intention expressed that the estate shall go over on a general failure of issue of the first taker, and not until there has been a complete failure, the first taker shall have an estate tail. This rule is so strong that it prevails, even where the issue of the first taker are named to take as tenants in common, or as joint tenants, or *are named by name; and it is also expressed, that the issue of that issue [368 shall inherit. Let us look to the words of the will; upon them it will appear that the predominant intention was, that the estate should not go over until all the issue of the nieces were extinct; and if that be so, then in order to effectuate that, any conflicting intention must be sacrificed. The testator first gives the estate to his nieces, "equally to be divided between them, share and share alike, for and during the term of their respective natural lives." If the devise had stopped there, the nieces would undoubtedly have taken an estate for life only; but coupling that clause with the ultimate remainder over, omitting the intermediate clauses, it becomes clear that they must take an estate tail. The difficulty in the case arises from those intermediate clauses. The proposition on the other

side must be, that the nieces take only for life, with contingent remainders either for life or in tail to their issue; but there are greater difficulties in the way of that construction than the other which has been proposed. After the devise to the nieces, the testator proceeds, "After the death of them, or either of them, the lawful issue of them and each of them shall have and enjoy his or her mother's share of such residue of such rents, &c., *for life in like manner.*" That clause, taken alone, would give the children of the nieces a life estate as tenants in common, but that would not effect the prevailing intention of the testator; it must therefore be contended on the other side, that the children of the nieces take an estate in tail. But their estate is restricted as strongly as that given to the nieces. In order to give them an estate tail, the ultimate remainder

*369] "over must be relied on; but that would rather give an estate of inheritance to the nieces, for the estate is to go over on failure of *their* issue.

There is no devise to the issue of the issue, or any thing to give them, an estate tail by implication. In order to give the children an estate tail, the words "for life in like manner" must be struck out; but if that can be done to effect the general intent of the testator, why may not the words "for life" in the devise to the nieces, and the whole clause devising to the issue of the nieces for life, be erased? Perhaps the testator intended to give a life estate to the several generations in succession, but the law prevents him from carrying that object into effect. Then comes the clause providing for cross-remainders, in the event of the death of one niece; that shows that the nieces were the objects of the testator's bounty, the termini a quibus the estate was to descend. The words "issue of the body lawfully begotten," in that clause, cannot, as words of purchase, point to children living at the death of the niece, but must be used as words of limitation; for, supposing one of the nieces to have a child, and that child to die in its mother's lifetime leaving a child, the latter would take nothing by such a construction; and so the prevailing intention of the testator would be defeated. The other side, therefore, must contend that the children of the nieces take an estate tail; they, therefore, are driven to reject the words "for life in like manner." But, if "issue" is to have an indefinite sense in this clause, why should it not in the former? If they do not reject those words, then the ultimate remainder over is the only clause to which they can resort as giving an estate tail

*370] to the children of the nieces; but the failure of issue, whereupon that remainder is to take effect, being referred not to the issue of the nieces, but to the nieces themselves, conclusively shows that the estate tail is given to the nieces.

Wight v. Leigh, 15 Ves. 564. The testator clearly intended that all the descendants of the nieces should take; and in order to effect that, they must have an estate tail by implication. (a) The testator next provides for the event of the death of two nieces; the words "save one" in that clause must be transposed to make sense of it, and then it will run thus, "If all my nieces, save one, and their issue shall die," &c. It would seem as if the testator intended, that the surviving niece should take for life, and the issue in fee; the latter, however, is cut down to an estate tail by the remainder over. (b) In that clause the word "issue" must be construed "indefinite descendants," or the argument as to the exclusion of a grandchild would be applicable to this as well as to the former clause, and the estate would go over before the complete failure of issue of the nieces, contrary to the testator's intention. [BAYLEY, J. It may perhaps be argued, that he intended to devise to the nieces for life, remainder to their children for life, as tenants in common, remainder to the issue of the surviving niece in tail.] Wherever there is a devise to the ancestor, remainder to the issue, and an ultimate remainder over on failure of issue, that has always been construed as a word of limitation. The only clause which remains to be

(a) See *Clements v. Paske*, cited in *Doe v. Hallett*, 1 M. & S. 130.

(b) See the rule of law on this point, as stated by Lord Kenyon in *Doe v. Hallett*, 8 T. R. 4

noticed is that giving the ultimate *remainder over. That can have but one meaning; that the whole estate should go over on the indefinite [*371 failure of issue of the testator's nieces, and not till then. Such is the prevailing and paramount object of the testator; and that, according to a series of decisions, is to be carried into effect at the expense of any particular intention that may be inconsistent with it. The rule of law upon this point was settled by *Robinson v. Robinson*, 1 Burr. 38; and that case was recognised and confirmed in *Doe v. Applin*, 4 T. R. 82, which is a very important authority in favour of the nieces of the testator in this case. The devise, there, was, "to W. Dimmock, to hold to him during his natural life, and after his decease, *to and amongst* his issue, and in default of issue, *over*;" and the court held that W. Dimmock took an estate tail. That case gets rid of any difficulty arising from the restriction of the estate given to the nieces, or from the direction that their issue shall after their decease enjoy it *in like manner*, i. e., share and share alike; for, in *Doe v. Applin*, it was urged that the issue must take as purchasers, because the estate was given *amongst* them, but the court held that the argument was not strong enough to prevent them from giving effect to the general intent of the testator. *Doe v. Smith*, 7 T. R. 531, is also a strong authority for the same position. The devise was, "to M. Ascough and the heirs of her body lawfully to be begotten, for ever, as tenants in common, and not as joint-tenants; and in case M. A. shall happen to die before twenty-one, or without leaving issue on her body lawfully begotten, then over." Lord KENYON in his judgment says, "I *admit, that in this case the testator intended [*372 that his daughter M. Ascough should only take an estate for life, and that her children should take as purchasers, but then he also intended that all the progeny of those children should take before any interest should vest in his more remote relations; now, the latter intention cannot be carried into effect unless M. A. takes an estate tail." So also in *Doe v. Cooper*, 1 East, 229, it was held, that under a devise "to R. Cock for the term only of his natural life, and after his death to his lawful issue as tenants in common," R. C. took an estate tail in order to effectuate the general intent. The case of *Shaw v. Weigh* comes very near the present; the devise was, "to trustees in trust for the testator's two sisters, equally between them, during their natural lives, without committing any manner of waste; and if either of his sisters should happen to die, leaving issue or issues of her or their bodies lawfully begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it should happen that both the sisters should die without issue as aforesaid, and their issue or issues to die without issue or issues lawfully to be begotten, then over." The case came first before the court of great sessions in Wales, where it was held that the testator's sisters, the first takers, had an estate tail, with cross-remainders in tail. This court was at first of the same opinion, but they afterwards decided that it was only an estate for life, 2 Str. 798; that judgment, however, was reversed by the house of lords, and the judgment *of the court of [*373 great sessions established. Fitzg. 7; 3 Br. P. C. That case is extremely like the present; the provision was there, "for the issue to take the mother's share," and yet "issue" was held not to mean children only. There, too, the provision, that the sister's estate should be without impeachment of waste, clearly showed that the testator thought he had not given, and did not intend to give, them any thing more than an estate for life; yet that particular intent was sacrificed to the paramount intent, that the estate should not go over until an entire failure of the descendants of his sisters. [BAYLEY, J. In *Ginger v. White*, Willes, 348, WILLES, C. J., says, that *Shaw v. Weigh* is not a case of any great authority.] The doctrine there laid down is recognised and confirmed in a variety of other cases, *Doe v. Halley*, 8 T. R. 5; *Wight v. Leigh*, 15 Ves. 564; *Barlow v. Salter*, 17 Ves. 479; *Bennett v. Lord Tankerville*, 19 Ves.

170. With respect to the leasehold tenements, the law appears perfectly clear. Formerly an opinion prevailed, that where freehold and leasehold property were devised by the same clause, the first taker of an express estate tail took an absolute estate in the leasehold, but not where the estate of inheritance was given by implication. *Atkinson v. Hutchinson*, 3 P. W. 258. That doctrine is now exploded; and it is a settled rule, that the first taker of an estate tail, whether it be given expressly or by implication, takes an absolute estate in the leasehold. *Daw v. Lord Chatham*, 6 Br. P. C. 450; *Chandless v. Price*, 3 Ves. 99; *Crooke v. De Vandes*, 9 Ves. 197. If these *are the correct

*374] answers to the first two questions, the third must receive the answer before pointed out; and then the fourth and fifth questions do not arise.

Campbell, for Maria Barnard, confined himself to the question, what estate was taken by the nieces in the freehold tenements—and he contended that they took an estate tail. The difficulty in construing this will arises from the words “for life” being introduced into the devise to the issue. But for these words there would have been a clear estate tail in the nieces; for no rule is better established than that, if there be a devise to A. for life, remainder to his issue, and if he die without issue, over;—however strong the intention may be expressed that A.’s estate shall be for life and no longer, A. shall take an estate tail, to effectuate the general intent of the testator, that the ultimate devisee shall take nothing while any descendants of A. remain. Here it evidently was the intent of the testator, that no part of his estates should go over to his next male heir of the name of Murthwaite, till after a general failure of the issue of his nieces. The devise being in words “for life,” both to the nieces and to their issue, the only mode of effectuating this intent is to give an estate tail by implication; and it must be admitted on the other side that an estate tail must be so given either to the nieces or to their issue. To give an estate tail to the issue, the words “for life” must be rejected; if rejected, the will is to be construed as if they had never been introduced; and then there would be a devise to the nieces for life, remainder to their issue, and for want

*375] of such issue, to the testator’s right heir. What is there *to show that the testator meant that there should be an estate tail in the issue more than in the nieces? There are no words of inheritance annexed to the estate given to the issue; and, on the contrary, an estate for life is expressly given to them. The words “for life” must be supposed to have been used by the testator, not to describe the quantity of the estate which he gave, but as conveying an unnecessary intimation of the length of time for which each generation was to enjoy the property. But where such words are inconsistent with an estate clearly given, they are rejected as repugnant, as in *Doe d. Cotton v. Stenlake*, 12 East, 515, where there was a devise to the testator’s daughter, P., and her heirs *during their lives*, she having two children then born; and it was held, that she took an estate of inheritance, Lord ELLENBOROUGH, C. J., observing that “the words *during their lives*, after the devise to the daughter and *her heirs*, was merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property.” It is always to be remembered, that the devise over here is on failure of the issue of the nieces, not on failure of the issue of their children. The nieces are the *stirpes* of the issue, upon an indefinite failure of whom the ultimate devisee is to take; and there has never yet been a case in which an estate tail has been given by implication on account of a devise over on failure of issue, that this estate tail has not been given to the *stirpes* from which such issue was to spring; and upon such a subject it must be much more salutary to proceed upon a broad

*376] established principle, than to *introduce new subtleties and distinctions. The words in the devise to the issue, that “each of them should have and enjoy *his or her* mother’s share,” strengthens the presumption, that the testator used “issue” as a word of limitation; for if he had meant that all the

children of each niece should take, he would have said, that they should have and enjoy *their* mother's share. Issue is *prima facie* a word of limitation; and the onus lies upon those who contend that it is used as a word of purchase, to show a clear intent to that effect from some other part of the will. "For life" must here be insufficient, these words being inconsistent with the estate of inheritance insisted upon by the other side, who are driven to contend, that the word *issue* is used by the testator in two different senses; first for *children*, and then for the whole *progeny* of the nieces. It may be said, that the testator probably wished to defer the power of alienation as long as possible, and that therefore he would prefer giving an estate tail to the children instead of the nieces. The consequence of effectuating the testator's general instead of his particular intent in these cases, certainly is, that the first taker is enabled to, and generally does, defeat both the general and particular intent, by gaining to himself a fee; but in construing wills the power of barring an estate tail is not taken into consideration, and it is supposed that the estate tail will descend according to the form of the gift. This consideration likewise answers the objection, that by giving an estate tail to the nieces, the children may be deprived of an estate expressly devised to them. As to the supposed injury to the younger children of the nieces, it is first necessary to show a particular intent that they should take as purchasers; and still that intent must give way to the general intent, that *the devise over should not take effect, except upon an indefinite failure of issue. In addition to the authorities already adduced [*377 on this point, may be cited, *Pierson v. Vickers*, 5 East, 548, where there was a devise to A., and the heirs of her body lawfully to be begotten, *whether sons or daughters, as tenants in common, and not as joint tenants*, and in default of such issue over, and this was held an estate tail in A. In two cases a different construction was put upon similar devises in this court; but both these cases have been overturned. In *Doe v. Goff*, 11 East, 668, the devise was to M., and the heirs of her body, as tenants in common, and not as joint tenants, but if such issue should die before he, she, or they respectively attain the age of twenty-one, then over; and it was held, that M. took only an estate for life, and that the children took by purchase estates tail as tenants in common. But this case was denied to be law, both by the present lord chancellor and by Lord REDESDALE, in the case of *Doe d. Wright v. Jesson*, 2 Bligh. P. C. 1. There the devise was to W. for life, with a power of appointment to the heirs of his body, and for want of such appointment to the heirs of the body of W., share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue, over. The court of king's bench, 5 M. & S. 95, held that W. took only an estate for life; but the judgment of this court was reversed in the house of lords; and the danger was pointed out of departing, on account of particular expressions in a will, from the established rule, that the ancestor shall take an estate tail where an estate is given *to him expressly for life, remainder to his issue or the heirs of his body, [*378 and for default of such issue to an ultimate devisee. The noble lords who decided that case rather discountenance the distinction between general and particular intent, and consider that when words are found in a will, inconsistent with the chief object of the testator, they are to be considered as not used by him in their technical sense. Suppose, therefore, that this testator, in the devise to the issue, does not mean by the words "for life," to express the quantity of estate he means to give, and all difficulty vanishes in construing the will. If the nieces, on the contrary, are held only to take estates for life, the greatest perplexity will arise in determining what estates would be taken by their issue, upon the different suppositions which might easily be made of the state of the family.

Littledale, for G. Barnard. The surviving trustee now has an estate in fee-simple in the freehold, and an absolute estate in the leasehold tenements. If

that be not so, then the nieces have estates for life, with remainder to their issue, as purchasers in tail as tenants in common, and G. Barnard has a vested remainder in tail in one-third, liable to be divested or opened upon the birth of other children of his mother, with a contingent remainder in tail in the shares of his aunts; and if he should be the only issue of the nieces living at the death of the survivor, he will have an estate tail in the whole of the freehold, and an absolute estate in the leasehold. Nothing is more clear than the answer to be given to the first question. It is true that the annuities are charged on the different personal securities, and it is found that the personal property is sufficient to pay the debts and legacies, but till they are actually satisfied (and that cannot be done while any of the annuitants are living,) the personal property may fail, and it may be necessary to resort to the realty. As to the other and main question, it must be admitted that in construing wills, the intention of the testator must be observed, and that if there be a general intent inconsistent with any particular one, the latter must be sacrificed. But both must be preserved where that is practicable. In this case it appears that the testator had several objects in view. First, that his nieces should take an estate for life. Secondly, that their issue should take for life. Thirdly, that the issue of the surviving niece should take in tail; for although the words are sufficient to convey a fee, yet the remainder over shows that an estate tail was intended. And lastly, which is perhaps the paramount intent, that the estate should go over on a complete failure of the issue of his nieces. That intent must at all events be preserved; but the court should also take care to preserve as many of the particular intents as they can consistently with the other object. Now the preservation of the first particular intent, viz., giving the nieces an estate for life, will not defeat the general intent, but the second would; for although an estate for life may be given to an unborn child, yet no remainder can be engrafted upon it. If, therefore, the issue of the nieces take an estate for life, the remainder over is destroyed. But the first, and also the third intent, viz., that the issue of the surviving niece shall take an estate tail, may be preserved consistently with the general intent; and the only alteration to be made in the testator's disposition of his property, *is to enlarge the estate given to the children of the nieces. By the construction contended for on the other side, the estate of the nieces is enlarged, and the remainder for life expressly given to their issue, as tenants in common, and the remainder in tail to the issue of the surviving niece are altogether destroyed; whereas by the other interpretation, only one particular intent is destroyed, and the case of *Humberston v. Humberston*, 1 P. W. 332, shows that it will be destroyed in such a manner as the rules of law require; for it will give an estate tail to the issue unborn, which they ought to take according to the general rule. Thus, then, the several devises will be preserved most nearly according to the testator's wish. [BAYLEY, J. "If the nieces have several children, how will they take?"] As tenants in common. [BAYLEY, J. Then you must contend, that the words "for life in like manner" are operative to show the intention of the testator, but ineffectual to perform it.] That certainly is so. The construction now proposed will not defeat the main intention, it will preserve both the remainder to the surviving niece and her issue, and to the next heir male of the name of Murthwaite. The whole estate will still go over together; for there will be cross-remainders in tail between the issue. The will creates cross-remainders between them as to the estate for life, and if that estate be enlarged to an estate tail, there will be the same cross-remainders as to that estate, as there otherwise would have been as to the estate for life. With respect to the clause devising to the surviving niece and her issue; it is clear that the "issue" there are to take as purchasers, for the devise is "to the issue and their heirs," as *tenants in common. [BAYLEY, J. Suppose the surviving niece to have died without issue, and that another had before died, leaving issue, would the

clause to which you now refer give an estate tail to the issue of the latter? Is there any case deciding that the expression, "if A. die without issue," can give an estate tail to a third person? The question of G. Barnard taking an estate tail or not cannot depend on the contingency of the nieces dying in any particular order. Supposing his mother to live longest an express estate tail is given, the same effect must, therefore, be extended by implication to the death of the nieces in any other order. [ABBOTT, C. J. That still leaves the question open, whether G. B. takes by purchase or by descent.] If the issue take only for life the devisee over cannot take at all; they must, therefore, have an estate tail to effectuate the general intent of the devisor. There is nothing to show that the nieces were to take an estate of inheritance. There is not any case which establishes, that where an estate for life is expressly given to the first taker, and also to the second, the first taker can have an estate tail. Thus, in *White v. Collins*, 1 Com. 289, the devise was to "F. M. for life, remainder to the heir male of his body for life, and for want of such heir male, over;" and it was held, that F. M. took only for life. [BAYLEY, J. That case decided that the heir male took only for life.] In this part of the will the testator provides for the death of all the nieces and their issue, save one, without issue; the issue are the persons whose death without issue is there contemplated; that word is, therefore, used as a word of purchase. In the same clause the testator says, that the issue of the surviving niece shall have and enjoy the *personalty; but if the nieces took an estate tail, they would have an absolute [*382 interest in the personalty, and the devise of it to the issue would be entirely defeated. *Doe v. Applin* cited on the other side is very distinguishable; there the general intent could not have been carried into effect without holding that the first taker had an estate of inheritance, and the same observation applies to *Doe v. Cooper* and *Doe v. Smith*. In the latter Lord KENYON observes, that there were no words of limitation added to the estate given to the children, and yet that the remainder over was not to take effect until there was a general failure of issue. Here the remainder to the issue of the surviving niece is on the death of the other nieces and their issue without issue, which makes this case altogether different from *Doe v. Smith*. *Doe v. Jesson* is distinguishable in a variety of particulars. There the devise was "to A. for life, and after his decease to the heirs of his body." Here, it is to the nieces for life, and then to their issue, which is frequently used as a word of purchase, whereas the other expression can very rarely, if ever, receive that construction. Again, here there is an express estate for life, given to issue of the nieces, but there was no such restriction of the estate given to the heirs of the body of the first taker, in *Doe v. Jesson*. Here, also, there are words of limitation added to the devise to the issue of the nieces, which are not found in any case where the first taker has been held to have an estate tail. In *Doe dem. Liversage v. Vaughan*, 5 B. & A. 464, testator devised "to I. L. for life, remainder to all and every his child and children, as tenants in common, and for want of such issue to his own right heirs for ever;" and it was held that I. L. took a life estate only. *Ginger dem. *White v. White*, Willes, 348, and *Goodtitle dem. Cross v. Wodhull*, [*383 ib. 592, are also authorities to show, that the first takers in this instance had nothing more than a life estate. It may be said, that the construction now contended for requires that the word "issue" should be used in two senses in different parts of the will. That, indeed, may be done, if necessary, to effectuate the testator's intention; but here it is not absolutely necessary; for although in the first place it means the children of the nieces, and in the second the children together with their descendants, yet in the former place it means the children, as the *stirpes* whence issue were to descend; they therefore, are part of the issue afterwards contemplated, and the word cannot be justly said to be used in two different senses. Upon the whole there cannot be any doubt that the testator intended to give his nieces an estate for life only, and if that be manifest

the court must say, that G. Barnard has now a vested estate tail in remainder in one-third of the freehold, liable, indeed, to be affected by future circumstances, and a contingent estate tail in the residue. As to the leaseholds, if the nieces took only estates for life in the freehold, they will take no more in the leasehold; but even if the nieces took estates tail in the freehold, they will take only estates for life in the leasehold, and the issue of the nieces will take the residue of the leasehold by way of executory limitation.

Parke, for George Irton Murthwaite, the person who would be the next heir male of the testator, of the name of Murthwaite, in the event of the nieces dying without issue. The interest of this party is certainly rather *remote, but
 *384] if the nieces take only life estates, and G. Barnard should die under twenty-one years of age, the remainder in fee would be vested in him. The argument, therefore, for G. Barnard, applies to his case also, and he must seek to have the same answers returned to the questions proposed that have been pointed out on behalf of the former. [*ABBOTT, C. J.* . We are not informed by the case whether the fund upon which the legacies and annuities are charged really exists. It is impossible for us to give a satisfactory answer to the first question, unless we know that, and also whether the debts and legacies are paid. *BATLEY, J.* We do not even know whether all or any of the annuitants are living.] Perhaps it is unnecessary to inquire into that, for if the testator intended that the trustees should take the estate, that must decide the question. [*ABBOTT, C. J.* He might intend them to take an estate, quousque]. Although there may not be any great probability that the realty will be wanted for the payment of the annuitants, yet still they have a right to that security. Besides, according to the construction contended for by G. Barnard and G. I. Murthwaite, there are contingent remainders; it is therefore necessary that there should be trustees to preserve them. In discussing the second and material question in the case, viz., what estate the nieces took, it is unnecessary to controvert the cases cited on the other side to show that by a devise of the rents and profits the land itself passes, nor can it be disputed that in construing wills the general intent of the testator must be followed, and any particular intent sacrificed, which, according to the rules of law, cannot stand consistently with the other; nor in this particular case is there any doubt as to what was the ge-
 *385] neral intent of the testator. The only question for the court is, how *that is to be carried into effect with the least sacrifice of particular intent? It has been already shown, that that will be done by holding that the nieces have an estate for life only. In every part of the will in which they are mentioned they are spoken of as taking for life. It is clear also, upon the words of the will, that the issue of the nieces were intended to take for life; and the issue of the surviving niece in fee, as tenants in common, although the remainder over reduces that to an estate tail. If an estate tail be given to the nieces, every one of those objects is defeated; whereas, if they take for life, and the issue in tail, the only alteration is by enlarging the estate of the latter. Issue, in the first part of the devise, means children. It is often used as a word of purchase, and in *Roe v. Grew*, 2 Wils. 322, (a) *CLIVE, J.*, says, "The word *issue* is one of the most vexed words in the books; sometimes it is nomen singulare, sometimes plural, sometimes a word of limitation, sometimes of purchase; but it must always be construed according to the intent of the will or deed wherein it is used." No case can be found where "issue" has been held to be a word of limitation, when coupled with such terms as are used in this will. The testator says that the issue shall take for life, in like manner as the nieces, i. e., as tenants in common. The words *for life* clearly show the intention, that they should take as purchasers, although those words cannot be operative in limiting the quantity of estate given; and, therefore, although they are rejected as a measure of the estate, yet the will cannot be construed as if they had never been

(a) See a better report in *Wilmot's Opinions*, 272.

inserted, for they are still to be looked at as explaining the meaning of the testator, to which, if possible, effect must be given. Then he *afterwards [*386 gives an estate tail to the issue of the surviving niece, in the event of two dying without issue; but as the testator wished the issue of each niece, if any, to take some estate as purchasers, and as in the event just mentioned, the estate given to the issue of the other is declared to be an estate tail; a similar estate must, by implication, be given to the issue of all the nieces, if they should have any. In *Ginger v. White*, WILLES, C. J., lays it down as a general rule of construction, that a precedent estate, devised by express words, cannot be lessened, increased, or altered by implication, although it may by express words, and he cited the case of *Popham v. Bamfield*, where the devise was "to P. for life, remainder to his first and other sons successively in tail male, and for want of issue male of P. remainder over;" and it was held that P. took a life estate only. Now the expression, "for want of issue male of P.," in that case exactly corresponds with "if all my nieces shall die without issue" here in the clause giving the remainder over, that therefore is insufficient to enlarge the estate for life, expressly given to the nieces; and according to WILLES, C. J., in that case a distinction was made between a devise "to A. for life, and if he die without issue over," without the interposition of any intermediate estate, and where the devise over, for want of issue, follows an intermediate estate. In *Doe v. Stenlake* the words *for life* being repugnant to the devise to the heirs were rejected; so here they may be rejected, being repugnant to the devise to the issue of the issue. As to using the word *issue* in two different senses, there are many cases which decide that words may be so construed, ut res magis valeat quam pereat. *Forth v. Chapman*, 1 P. W. 663; *Earl of *Stafford v. Buckley*, 2 Ves. sen. 171; *Harris v. Bishop of Lincoln*, 2 P. [*387 W. 135; *Sheffield v. Lord Orrery*, 3 Atk. 282.

Tindal, in reply. Enough appears on the case to show that it is not necessary for the trustees to take the real estate for the purposes of will. As to the main question there is no case to justify the construction contended for on the other side; for wherever the devise over on failure of issue applies to the first takers, they must take an estate of inheritance. Without resorting to the devise over, there is nothing more than a life estate given first to the nieces, then to their children. But it is contended that the clause providing for the death of all the nieces, save one, without issue, by implication gives an estate tail to the issue of all the nieces. That, however, cannot be the effect of it, unless two different meanings be given to the word *issue* in the same sentence, which would be contrary to *Doe v. Applin*. [BEST, J. The context may show clearly that the testator meant to put two different senses upon the same word.] Even supposing that it could be so construed, still, in order to effectuate the principal object of the testator, that the whole estate should go over together, there must be cross-remainders between the families of all the children of the nieces; but there are no words from which cross-remainders can be implied between the families derived from the different children, as *stirpes*. And therefore the estate might, if that construction were adopted, go over in parcels; whereas, according to the other construction, the families of the nieces would enjoy the estate to the exclusion *of the devisee over, which was the testator's wish, for the nieces were the objects of his bounty. [*388

The following certificate was afterwards sent:

This case has been argued before us, and we are of opinion,

First, that John Cuthbertson, the surviving trustee, now has a fee-simple in the freehold estates, and an absolute interest in the leasehold estates, given by the will of the testator to him, Margaret Murthwaite, and John Janes.

Secondly, that the testator's three nieces took no legal estate under this will.

Thirdly, that George Barnard took no estate under this will.

Fourthly, that in case the will had commenced with the words, "all the rents.

&c.," and the passage before those words had been omitted, that the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold.

Fifthly, that George Barnard would now have no estate in the freehold or leasehold tenements. But should he survive the three nieces, and neither of them should have any other child, he will be tenant in tail of the freehold, but have no interest in the leasehold estates. Should he die in the lifetime of the three nieces, he would die seized of no freehold, nor possessed of any leasehold estate.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD

W. D. BEST.

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***Exparte ENDERBY in the Matter of GILPIN.**

Where A. and B. were partners, but the whole of the business was carried on by and in the name of A., B. never appearing to the world as a partner; and at the dissolution of the partnership, by effluxion of time, all the partnership stock and effects, by agreement between them, were left in A.'s hands, who was to receive and pay all the debts due to and from the concern, and to repay by instalments the capital brought in by B.; A. having continued to carry on the business as before for a year and a half, when he became bankrupt: *Held*, that all the partnership property and effects so left in A.'s hands, and also the debts due to the concern, passed to his assignees, being in the order and disposition of the bankrupt within the intent and meaning of the 21 Jac. 1, c. 19, s. 11.

THIS was a case sent for the opinion of this court, by the lord chancellor. It arose out of a petition by Samuel Enderby, praying, amongst other things, that the commissioners acting under a commission of bankruptcy against William Gilpin, might be directed to keep distinct accounts of the estate and effects of the copartnership hereinafter mentioned, and that the assignees and commissioners might be directed to apply the same in discharge of the outstanding debts of the copartnership then remaining unsatisfied, or pay over the same to the petitioner, for the purpose of making such application, and that he might be at liberty to prove, under the commission, a sum of 15,902*l.* 19*s.* 8*d.* William Gilpin, the bankrupt, in and previously to the month of September, 1807, carried on trade as a general merchant, and also as an army-clothier, army-agent, and woollen-draper; and in September, 1807, a partnership was formed between the bankrupt and Enderby, on the terms contained in a deed of copartnership, bearing date the 24th day of September, 1807, between the bankrupt and Enderby, by which, amongst other things, they agreed to become and continue copartners in the trade of an army-clothier, army-agent, and woollen-draper, and all matters relating thereto, for the term of ten years from the date of the deed, and that the trade should be carried on in the name of

*390] Gilpin only, or in the names of *Gilpin and such other person or persons as should be admitted into the partnership by Gilpin, as therein mentioned. The deed also contained stipulations that Enderby should bring 20,000*l.* into the concern; that the conduct and management of the partnership business should be under the sole direction and control of Gilpin, and that Enderby should not be required in any way to interfere; (a) that Enderby should receive 2000*l.* a year, for his share of the profits, and that Gilpin should have all the residue. Enderby did advance and pay the said sum of 20,000*l.* to Gilpin, and the partnership accordingly began and was carried on between them, from the 24th day of September, 1807, to the 24th day of September, 1817, when the same determined by effluxion of time, and Enderby, from time to time during the continuance of the partnership, received from the bankrupt 2000*l.* in each year, by two half-yearly payments. Gilpin, during the partnership, carried on and conducted the business in his own name alone, without any inter

(a) See this partnership-deed set out fully in *Gilpin v. Enderby*, 5 B. & A. 254.

ference by Enderby, who took no part whatever in the conduct and management of the partnership business and concerns, and did not appear, and was not known to the world as a partner, but was a sleeping or secret partner, and whose name did not ever appear as a partner in the partnership books. After the 24th of September, 1817, when the partnership determined, until the month of April, 1819, when Gilpin became a bankrupt, he continued to carry on the said trade or business of army-clothier, army-agent, and woollen-draper, as well as his other business of a general merchant, in his own name and on his own account, and *with the same capital, property, stock, and effects, and in the same manner as he had before carried on the same, during the partnership, [*391 and he received some of the debts which were due to him as a partner with Enderby, and paid debts which were due from him as well on his own account, as in respect of the copartnership business, without any interference by Enderby; and in the course of carrying on such business as aforesaid, after the determination of the partnership, Gilpin, the bankrupt, contracted debts with various persons, which debts remained unpaid. Gilpin having committed an act of bankruptcy, a commission of bankrupt issued against him, on the 1st day of April, 1819, and Lionel Knowles the younger, John Webb, and John George Nutting were chosen and appointed assignees of his estate and effects. After the determination of the partnership, and before the bankruptcy, Gilpin paid to Enderby a part of the said principal sum of 20,000*l.*, and at the time of the bankruptcy of Gilpin, there was due from him to Enderby a sum of 15,908*l.* 19*s.* 8*d.*, part of the principal sum, and an arrear of interest. At the time of the bankruptcy of Gilpin his property consisted of goods and merchandise, part of which had been the partnership property, but with which he continued to carry on business after the determination of the said partnership; and also of debts due to him, part of which had been contracted during the partnership, and were due to the partnership. Enderby, after the said bankruptcy, was called upon to pay, and did pay debts of the said partnership to a very great amount, no part of which had been repaid to him, out of or by means of any partnership effects. The question for the opinion of this court was, whether the property and effects of the late partnership, and *the debts due to the said William [*392 Gilpin on the said partnership account, at the time of the expiration thereof, and at the time of the bankruptcy of William Gilpin, or any and what part or parts of such property, effects, or debts, were in the order and disposition of the bankrupt at the time of his bankruptcy, within the intent and meaning of statute made and passed in the twenty-first year of the reign of his late majesty King James the First.

In this case a preliminary question arose as to the party whose counsel was entitled to begin, there not being any cause in the court of chancery. It was decided, that the counsel for that party who had to support the affirmative of the question proposed for the opinion of the judges should begin; and accordingly,

Campbell, for the assignees of Gilpin, began. The whole of the property and effects of the partnership between Gilpin and Enderby, and the debts due on account of it at the time of the dissolution, and of Gilpin's bankruptcy, were in the order and disposition of the latter, and passed to his assignees, by virtue of the 21 Jac. 1, c. 19, s. 11. There is no distinction between debts due and other property, they are within the statute, *Exparte Ruffin*, 6 Ves. 128, and pass, unless they have been assigned, and notice has been given to the debtor. In *Longman v. Tripp*, 2 N. R. 67, it was held that the right to print a newspaper passed by virtue of the enactment in question. It appears that the partnership expired in September, 1817, and Gilpin did not become bankrupt until April, 1819; during the whole of the interval he continued to carry *on [*393 business as before, and was in possession of the partnership stock and debts, and was enabled to contract new debts, by means of the credit which

that gave him. It is true, that Enderby was tenant in common of one moiety, but Gilpin was in possession of the whole as of his own property, not as tenant in common. If the tenancy in common had been notorious, Enderby's share would not have passed to the assignees of Gilpin; but if the latter had such a possession, as to all appearance could only be consistent with the sole ownership, then all the property passed to his assignees. The world never heard of Enderby as owner, and, by an express agreement, he renounced all control over the goods, and it was stipulated, that Gilpin should dispose of them as he thought fit. This case, then, is within the very words of the 21 Jac. 1, c. 19; it is also within the mischief which that statute was intended to remedy. Gilpin acquired a false credit by the possession of this property. It is not necessary for the court to decide, that wherever a firm consists of a dormant and an ostensible partner, and the latter becomes bankrupt, the whole property will pass to his assignees, (although such a proposition might be sustained,) for here the partnership was at an end before the bankruptcy of the ostensible partner. There may be a difference between the two cases, for in the former the dormant partner would be liable to all the debts of the firm; and, therefore, those who trusted the ostensible partner would not be injured by any false credit conferred upon him. [BAYLEY, J. In some cases they might, viz., if money were lent to him on his private account, and not in the way of his trade; now a man might be induced to lend him money on private account, in consequence of his *394] apparent *ownership of the whole stock in trade.] Here, a fortiori, the public are injured by the false credit, for the dormant partner will not be liable to debts contracted after the dissolution; but unless prevented by the statute, he may come and claim the property, upon the credit of which the ostensible partner had been enabled to contract those debts. The new creditors, therefore, have been deceived. This case cannot be distinguished from that of a partner retiring, and taking a mortgage upon the effects; but in such case, if the remaining partner becomes bankrupt, the whole property passes to his assignees. *Ryall v. Rolle*, 1 Atk. 165. In *West v. Skip*, 1 Ves. sen. 239, Lord HARDWICKE was of opinion, that if Harwood, on the dissolution of the partnership which had existed between him and Skip, had continued in possession of the property with the assent of the latter, the whole would have passed to his assignees. Perhaps it is unnecessary to make any observation upon *Flyn v. Mathews*, 1 Atk. 185, which is the next authority, as the explanation of it, given in *Kirkley v. Hodgson*, 1 B. & C. 588, shows, that it is not applicable to the present question. In *Binford v. Dommatt*, 4 Ves. 756, an issue was granted to try the question of partnership, and the result does not appear; but Lord ALVANLEY, then master of the rolls, expressed a strong opinion, that a secret partnership did not prevent the operation of the statute. Then comes the case of *Coldwell v. Gregory*, 1 Price, 119, the authority of which is much shaken by what fell from the present lord chancellor, in *Ex parte Dyster*, 2 Rose, 256. But considering it as law, it is still distinguishable *395] from *the present case; there it was agreed, that the party going out of the concern should have a certain share of the bricks, and it was not there agreed that the other partner should continue in sole possession, and carry on trade, and acquire credit, as sole owner of the property. It rather resembles *West v. Skip*, than the case now before the court. [BAYLEY, J. Perhaps there had not been time to remove the bricks, and then no laches would be imputable.] The last case on the subject is *Kirkley v. Hodgson*, which decides this question in favour of the assignees of Gilpin.

Parke, contrà. The case of *Coldwell v. Gregory* is expressly in point, and the court cannot decide in favour of the assignees of Gilpin, without overruling that case: many inconveniences will result from such a decision. Supposing Enderby to be solvent (which is the fact) he has already paid partnership debts to a large amount, and will have to pay others, and yet will be deprived of all

the partnership property acquired by the contracting of those debts. Or supposing Enderby to become bankrupt, the joint creditors, who have contributed to the raising of the joint property, will have no remedy until all Gilpin's private creditors are satisfied. [BAYLEY, J. If the creditors became so under an idea that Gilpin was the sole trader, is there any case which shows that they could not prove under his commission?] They might prove but could not have a dividend. *Ex parte Elton*, 3 Ves. jun. 238. The question, however, depends entirely upon the construction to be put upon the 21 J. 1, c. 19, s. 11. Here the property was originally *partnership property, and was originally in the control of one partner alone: this case is therefore quite different [*396 from *Kirkley v. Hodgson*, where the court for the first time held that the statute extends to cases of tenancy in common; and, at the same time, that was carefully distinguished from all cases where the property did not originally belong to the bankrupt alone. So in *Lingard v. Messiter*, 1 B. & C. 308, HOLROYN, J., says, "If it had been demised to a person who never had been owner, and he afterwards became bankrupt, the mere possession might not be sufficient to show that he was either real or reputed owner." It makes no difference that the partnership had in this case expired before the bankruptcy. Partnership may be defined as a joint interest in the property, with a mutual power of attorney to make contracts affecting it. The dissolution of the partnership does not alter the property, but merely destroys the power. [BEST, J. That would, in general, be true, but here, by the contract, Gilpin was to have all the goods, and Enderby was to be a creditor for 20,000*l.*] Then the statute does not apply at all to the case, for if Enderby had not the ownership, but merely an equitable lien, he could not take the goods out of Gilpin's hands. But if it be not so, the case will nevertheless stand as if the secret partnership still continued; and then *Coldwell v. Gregory* is precisely in point. It appears from *Ryall v. Rolle*, that various opinions have at different times prevailed respecting the construction which ought to be put upon the 21 J. 1, c. 19, s. 11. In the earlier cases it was thought that the enactment was controlled by the preamble; afterwards a more *extended meaning was given to it. In the present age trade is in a great degree, if not chiefly, carried on by sym- [*397 bols rather than the actual possession of goods; and, therefore, the policy of giving a very large and comprehensive meaning to the statute is, at least, extremely doubtful. The legislature appear now to be of this opinion, for very soon after the case of *Kirkley v. Hodgson* was decided, the 4 G. 4, c. 41, was passed, by the forty-fourth section of which it was provided, that the rights of mortgagees of ships should not be affected by the bankruptcy of the mortgagor, even though the latter continued in possession, and to have the order and disposition of the vessel up to the time of the bankruptcy. Four distinct propositions arise upon the 21 J. 1, c. 19, s. 11. First, that the mere possession of goods is not sufficient to bring the case within the operation of the statute. Secondly, when the property has not originally belonged to the bankrupt, the statute only applies where the apparent and true owner are different persons, or in other words it cannot apply where the bankrupt has a real interest in the goods. Thirdly, a false credit must be obtained; and, Fourthly, the goods must be in the possession, order, and disposition of the bankrupt, with the consent of the true owner. The result of those propositions is that the statute can never apply to partnership property. The first proposition is proved by *Lord Shaftesbury v. Russell*, 1 B. & C. 666; the case of goldsmiths, factors, &c., put by the court in *Mace v. Cadell*, 1 Cowp. 232, *Collins v. Forbes*, 3 T. R. 316; and *Ex parte Martin*, 2 Rose, 331; which last case, to a certain extent, proves the second *pro- [*398 position also, viz., that the statute does not apply where the possession of the bankrupt is connected with title, which is also according to the doctrine of *Joy v. Campbell*, 1 Sch. & Lef. 328, where Lord REDSDALE enters very fully into the object and meaning of the statute; *Howard v. Jemmet*, 3 Burr

1368; and *Copeman v. Gallant*, 1 P. W. 314. [BEST, J. In those cases the bankrupt was a trustee, and it may be conceded that trustees are not within the operation of the statute.] The true ground on which they are excepted is that the real and apparent ownership are not different. *Flyn v. Mathews* is also in point, the true ground of which decision MANSFIELD, C. J., in *Mucklow v. Mangles*, 1 Taunt. 319, states to have been that the statute does not apply to cases of tenancy in common. Thirdly, there must be a false credit acquired by the bankrupt, but the mere possession of goods is not sufficient to give such credit. There are so many purposes for which one man may be in possession of the goods of another, that the world cannot be justified in supposing that all the goods in a trader's possession are his own. Fourthly, the possession of the bankrupt must be with the consent of the true owner, and therefore, the statute does not apply where he cannot take possession of the goods. For this reason ships transferred, when at sea, have always been excepted. *Ex parte Batson, Co. Bank. Laws*, 335, (346,) 7th edit.; *West v. Skip*, 1 Ves. sen. 239. Now one tenant in common cannot bring trover to get the property out of the hands of another. [BEST, J. At all events he may notify to the world that it does not remain in the hands of the other with his assent. BAYLEY, J. Here there was an express agreement that the goods *399] should remain in Gilpin's hands, *and Enderby renounced all control over them.] Even had he dissented he could not have taken away the goods, and therefore his assent to their remaining in Gilpin's hands has not had the effect of giving the latter a false credit. At all events the four propositions are not satisfied by the facts of this case, and, therefore, the goods in question are not within the operation of the statute.

Campbell in reply. If it be held that this property does not belong to the assignees of Gilpin, then his separate creditors who trusted him on the faith of his apparent ownership of the property, will not have any fund to resort to for payment; whereas the joint creditors may resort to this fund, the partnership having been secret, and may also resort to Enderby, who is solvent. As to the observation, that this was not originally the property of the bankrupt, the only difference which that makes is, that here the onus of proving the bankrupt to have been the reputed owner is cast upon the assignees; whereas in the other case, it would be for the person claiming the property to show that the change of ownership was notorious. *Lingard v. Messiter*, 1 Barn. & Cres. 308. All the four propositions put on the other side may be admitted. As to the first, possession alone is undoubtedly insufficient; but this was not a mere case of possession, the goods were in the order and disposition of the bankrupt. As to the second proposition it is true, that the real and apparent owner must be different, but that was the case in this instance; for although of one moiety Enderby was the true owner, Gilpin was the apparent *owner of the whole. *400] The corollary attempted to be deduced from that, viz., that the statute does not apply where the bankrupt has a real interest in the goods, by no means follows. It would quite overturn the case of *Kirkley v. Hodgson*, and there is no reason why the statute should not apply to cases of tenancy in common. As to the third proposition, false credit was obtained, and, to use the expression of Lord REDESDALE in *Joy v. Campbell*, the goods were unconscientiously left in the possession of the bankrupt; and lastly, Enderby's moiety of the goods was in Gilpin's possession, order, and disposition with the express assent of the owner. There is not, then, any pretence for saying that those goods do not pass to Gilpin's assignees.

The following certificate was afterwards sent to the lord chancellor:

This case has been argued before us, and we are of opinion that the property and effects of the late partnership, and the debts due to the said William Gilpin on the said partnership account at the time of the expiration thereof, and at the

time of the bankruptcy of William Gilpin, were in the order and disposition of the bankrupt at the time of the bankruptcy, within the intent and meaning of the 21 Jac. 1, c. 19, s. 11.

J. BAYLEY.
G. S. HOLROYD
W. D. BEST.

*SMITH and Another, Assignees of the Estate and Effects of J. H. SAMPSON, a Bankrupt, v. J. WATSON and J. B. LOCKE. [*401]

An agreement between A., a merchant, and B., a broker, that the latter should purchase goods for the former, and in lieu of brokerage, should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses, does not vest in B. any share in the property so purchased, or in the proceeds of it, although it may render him liable as a partner to third persons.

ASSUMPSIT for money lent and advanced, had and received, and upon an account stated, by and between the bankrupt and the defendants, before his bankruptcy. There was also another count, upon an account stated between the plaintiffs, as assignees, and the defendants. Plea, general issue. The cause was tried before BAYLEY, J., at the last assizes for the county of York. The plaintiffs were the assignees of the estate and effects of J. H. Sampson, a bankrupt, under a commission, which issued on the 1st February, 1823, founded on an act of bankruptcy committed on the 28th January preceding. The bankrupt, in 1822 and 1823, carried on business at Hull, as a merchant and wharfinger, under the firm of George Holden and Co., and the defendants were bankers there, with whom the bankrupt kept cash. On the part of the plaintiffs it was proved, that the bankrupt, on the 22d January, 1823, paid into the hands of the defendants a bill of exchange of that date, drawn by him in the name of G. Holden and Co., upon one Le Cointe, for 1689*l.*, payable two months after date, and that the defendants at that time gave him credit in account for that sum. This bill was not accepted when presented, but the amount of it was afterwards paid by the acceptor, and received by the defendants, and by their pass-book it appeared that there was due to the bankrupt, provided the whole proceeds of *the bill belonged to him, a balance of 493*l.* 2*s.* 9*d.* That sum the defend- [*402] ants, on the 12th May, 1823, paid, under an indemnity, to one George Gill, who claimed to be a partner with the bankrupt in the proceeds of the bill. The defence was, that Gill was a partner with Sampson, in considerable speculations in whalebone; that the bill was drawn upon Le Cointe, upon account of a parcel of whalebone purchased by him, and which was the joint property of Gill and bankrupt, and that the defendants were therefore justified in paying to Gill the balance due upon that bill. In support of this case it was proved by several witnesses, that in August, 1822, it had been verbally agreed, between Sampson and Gill, that the former should buy whalebone, through Gill, as his broker, and that, as a remuneration for his trouble, he should receive one-fourth of the profits arising from the sale, and bear one-eighth proportion of the losses. Under this agreement various parcels of whalebone were bought and sold, which yielded a considerable profit, but all the transactions under it were concluded in 1822. Sampson then entered into other speculations in 1823, and continued to employ Gill as broker, and upon these latter transactions it was agreed that Gill should receive one-third of the profits. It did not appear whether he was to bear any proportion of the losses on these latter transactions. All the witnesses stated that Sampson employed Gill to purchase and sell whalebone, *as a broker*, and that he never spoke of him otherwise than *as his agent*. It appeared further, that when Sampson brought the bill of 1689*l.* to the defendants, in January, 1823, he stated that it was drawn upon Le Cointe for whalebone. The account

of the bankers was kept in the name of G. Holden and Co., and there was no other account *in which Sampson had any interest. After the bill was
 *403] paid in, several payments were made on account of G. Holden and Co. to a considerable amount; and until the bill was paid there was a balance against that firm. Le Cointe refused to accept the bill, until the whalebone was delivered, which did not take place till the 8th February, and on that day Gill gave the defendants notice that the bill was his. Upon this evidence it was contended, that Gill was not a partner in the property purchased, although he might be liable, as a partner, to third persons, in respect of any claims arising out of the speculations before mentioned; and secondly, assuming that he was a partner in the property, he was only a secret partner, and then his share of the property having continued, with his consent, in the order and disposition of Sampson, to the time of his act of bankruptcy, passed to his assignees, under the statute 21 Jac. 1, c. 19. The learned judge reserved both the points, and the plaintiffs had a verdict, the defendants having liberty to move to enter a nonsuit. A rule nisi having been obtained for that purpose in last Michaelmas term,

Brougham (with whom were *Parke* and *Alderson*) now showed cause, and contended, first, that although Gill might be liable as a partner to third persons, he had no property in the whalebone purchased. The purchases having been made by him as a broker, must have been made in the name of the bankrupt. He cited *Meyer v. Sharpe*, 5 Taunt. 74, and *Hesketh v. Blanchard*, 4 East, 144, as authorities in point. Secondly, assuming that Gill had a property in
 *404] the whalebone purchased, and in the proceeds of the *bill, which was the subject of the present action, he was only a secret partner; and then the case of *Ex parte Gilpin* is an authority to show that the balance of those proceeds will pass to Sampson's assignees, under the 21 Jac. 1, c. 19, s. 11. (He was then stopped by the court.)

Tindal, contra, in support of the rule, made two points; first, that Gill was the partner of Sampson in the whalebone purchased; and if so, secondly, that he had a right, notwithstanding the bankruptcy of the latter, to his share of the proceeds of the bill in question, inasmuch as they had not been mixed up with the general property of the bankrupt. As to the first point, it was agreed in the first instance between Gill and Sampson, that the former should share in both profit and loss; under such an agreement they must, according to all the authorities, be considered as partners; but assuming that he was not to bear any proportion of the loss upon the purchases made in 1823, still the right to participate in the profits specifically, made him a partner. In *Waugh v. Carver*, 2 H. Bl. 235, (a) it was expressly held that an agreement not to share in losses did not prevent the parties being partners. It is true that an agreement, that a broker shall have for his own profit whatever he can obtain upon the sales above a certain sum, does not make him liable as a partner to third persons, *Benjamin v. Porteus*, 2 H. Bl. 590; *Dry v. Boswell*, 1 Campb. 329; but it has been laid down, that if a person agree to pay another for his labour in a concern, a given sum in proportion to a given quantum of the profits, this does not constitute a
 *405] partnership as to third persons, but that it *does constitute a partnership if he have a specific interest in the profits themselves as profits. *Ex parte Hamper*, 17 Ves. 404. *Meyer v. Sharpe*, 5 Taunt. 74, has been cited to show that Gill had no interest in the property, but in that case the bankrupt himself proved that he was the sole owner of the cargo. Here there is no evidence to show that Sampson was the sole owner of the whalebone; and if not, then the very agreement to share in the profits makes a party not only liable as a partner to third persons, but gives him a joint interest in that property out of which his profit is to arise, or in respect of which he is to incur a legal liability. Secondly, if Gill was a partner, he had a right to claim his share of the proceeds

(a) See also *Cheap v. Cramond*, 4 B. & A. 663.

of this bill notwithstanding the bankruptcy of Sampson. Here, the bill existed in specie at the time of the act of bankruptcy. It was not accepted till the 8th February, and on that very day Gill gave notice to the defendants that the bill was his. The proceeds of the bill never mixed with Sampson's money, for the balance of the banker's account was always against him until the bill was paid. The bankrupt and Gill were tenants in common of the bill of exchange. If Gill had been an open ostensible partner, it is clear that he, as solvent partner, might dispose of the partnership proceeds. *Fox v. Hanbury*, Cowper, 448; *Smith v. Stokes*, 1 East, 363; *Smith v. Oriell*, 1 East, 368. This is not a case within the statute 21 Jac. 1, c. 19, s. 11. That statute contemplates two different persons, as the true owner and the reputed owner. Here the bankrupt was both. The object of the statute was to put a loan of, or entrusting the bankrupt with goods in *the same situation as a loan of money, and so to make a dividend only payable in each case. Factors are expressly excepted, and [*406 dormant partners ought to be considered as virtually excepted. In *Ex parte Gilpin*, the partnership ceased in 1817, and the share of the dormant partner was suffered to remain in the custody of the bankrupt for two years. But here, at the time of the bankruptcy the partnership still continued, and the bill of exchange was in specie, and before it became due, notice of Gill's interest was given to the bankers. In *Kirkley v. Hodgson*, 1 B. & C. 588, there was an express stipulation, that the bankrupt should continue the apparent owner of the whole ship. There the property once belonged to the bankrupt alone, and he conveyed away part, and kept the possession of the part so conveyed. Here, the whalebone and the bill of exchange did not belong to the bankrupt alone. In *Ex parte Flyn*, 1 Atk. 185, the bankrupt was tenant in common, and the interest of his co-tenant in common was held not to pass to his assignees; and that was the true ground of the decision, as appears by *Mucklow v. Mangles*, 1 Taunt. 318. But in *Coldwell v. Gregory*, 1 Price, 119, the court of exchequer decided, that a dormant partner was not within the statute 21 Jac. 1, c. 19, s. 11. [BAYLEY, J. That case was considered by this court in *Ex parte Gilpin*, and we certified that a secret partner was within the statute. BEST, J. I could not have signed the certificate sent in that case, unless I had satisfied myself that the decision in *Coldwell v. Gregory* cannot be supported.]

*BAYLEY, J. After the discussion which this case has undergone, I do not feel any difficulty in pronouncing a decision upon it. The defendants [*407 were the bankers of Sampson, who traded under the firm of Holden and Co., and as such, were *primâ facie* bound to account to him before his bankruptcy, and to his assignees after his bankruptcy, for all property which had come from him to their hands. Instead of so accounting, they paid over to Gill part of the proceeds of a bill which they had received from Sampson. It lies upon them therefore to show that they were justified in making that payment; for if an agent takes upon himself to make over the property of his principal to another person, the onus lies upon him to show that he had authority so to do. It is said that they were justified in so doing, because the money was the joint property of Sampson and Gill, inasmuch as it was part of the proceeds of a bill drawn by Sampson for the price of whalebone, which was the joint property of him and Gill. Had it been purchased in their joint names, the property in it would have been joint, and the defendants would have been justified in making this payment to Gill; but there is no evidence to show that the whalebone was purchased in the name of Gill, or that he ever had any property in it. It is said, that the jury ought, upon the evidence, to have found that Gill was a partner in this property; I think, however, that the inference is the other way. All the witnesses speak of Gill as a broker, who was to be paid for his trouble in a particular way, viz., by a share of the profits. Now a right to share in the profits of a particular adventure, may have the effect of rendering a person liable to third persons as a partner, in respect to transactions arising out of the particu-

*408] adventure in *the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject-matter of the adventure. Gill's right to claim property in the whalebone must arise out of the terms of the bargain with Sampson; and looking to them, it appears clearly, that it was not joint property. It may be assumed that it was purchased in the name of Sampson only, for Gill was a mere agent, and was to have a proportion of the profits in lieu of brokerage. Considering the question in this view, I am clearly of opinion that Gill had no property in the whalebone or in the proceeds of the bill; and that being so, the question on the statute of James does not necessarily arise, but still the case is very strong in that respect; for, if Gill was a partner, it is quite clear, upon the evidence, that he was a secret partner only. The bill was not specifically appropriated to the whalebone account, or to any transaction in which Gill was concerned, but was to be applied to the general purposes of Sampson's trade. Gill, the secret partner, therefore suffered Sampson to appear to the world as the sole owner of the bill, and the latter had the order and disposition of the proceeds, with the consent of the true owner, within the meaning of the statute of 21 Jac. 1, c. 19, s. 11. The object of which statute was, that that which appears to be the case should be taken really to be so against him who allows such appearances to exist. Upon both grounds I think that this rule must be discharged.

HOLROYD, J. I am of opinion that both the points which have been raised must be decided against the defendants. Assuming it to have been agreed between

*409] *Sampson and Gill that the latter should make purchases of whalebone, and in lieu of brokerage, should have one-third of the profits arising out of the sales, and that he should even bear a certain proportion of the losses, I am of opinion that, although such an agreement might make Gill liable as a partner to third persons, yet that it did not vest in him any interest in the whalebone purchased with the money of Sampson. Such an agreement would not convert that which was obtained by the separate property of Sampson into the joint property of Sampson and Gill. It may be collected from the evidence that the latter did not furnish any part of the money required to pay for the whalebone, and that the contracts of sale were made, not in his name, but in that of Sampson, for Gill was to act as broker only, and to receive a share of the profits in lieu of his brokerage. The money paid for the whalebone being therefore Sampson's separate property, and the contracts being made in his name as the purchaser, the property in the things purchased would vest, by virtue of the contracts, in him alone. It has been contended that the legal effect of an agreement, to allow to a broker a share of the profits of goods purchased by him, is to vest in the party entitled to that proportion of the profits, the same proportion of the property purchased, and therefore that, in this case, Gill became tenant in common or joint tenant as to that part of the property. If Sampson had in terms agreed that Gill should have that proportion of the property itself, it would no doubt have become the joint property of the two. But here the agreement is wholly different, and it is perfectly consistent with it that Sampson should retain the entire interest in the property. It may have been a reasonable bargain that

*410] Gill, in lieu of a *brokerage, which was a sum certain, should receive a share of the profits, which were contingent and uncertain. But it might be most unreasonable that in consideration of giving up his brokerage Gill should have the same proportion of the property itself, which was purchased with the funds of Sampson. Gill would thereby have a control over the property itself, while Sampson continued the only person, *primâ facie* and ostensibly, subject to all liabilities accruing in respect of it. It would, therefore, be contrary to the intention of the parties, to construe such an agreement to have the effect of giving to the party, entitled to share in the profits, any interest in the property itself. It may, indeed, by a general rule of law, founded upon reasons of policy, render him liable, as a partner, to third persons. But the

power over the property in this case remains, as it was before the money was converted into goods, in the purchaser. I am also of opinion, that if Gill was a partner he was a secret partner only, and if so, then he, being owner of part of the whalebone, and of the bill which was given in payment for a parcel of such whalebone, suffered Sampson to appear to the world as the owner of the whole. The latter continued in possession of the bill down to the time of his act of bankruptcy. It was, therefore, in his order and disposition, with the consent of the true owner, within the meaning of the statute of James. For these reasons I am of opinion that this rule ought to be discharged.

BEST, J. There are two questions in this case, the first is whether Sampson and Gill had a joint interest in the whalebone, and assuming that they had, then the second question is, whether that part of the property *which Gill had in this bill of exchange was not in the possession, order, and disposal of the bankrupt at the time of the act of bankruptcy, with the consent of the true owner, within the meaning of the statute 21 Jac. 1, c. 19, s. 11. Now, upon the first question, I am clearly of opinion that Gill had not any joint interest in this property. The question is not whether he is liable to third persons, as a partner, but whether he had such joint interest. There are many cases where a person may be liable to third persons as a partner, and yet not have any interest in the property. Thus, a person who retires from a house of trade and suffers his name to continue in the firm, after he has ceased to be an actual partner, is liable to the world as a partner, although the property belongs entirely to other persons. It has been urged that this may be considered as a question between Sampson and Gill, if no bankruptcy had intervened. If the former, in such a case, had brought an action for the balance of the proceeds of the bill, he might have recovered, for it is clear that Gill had no share in the property. The person furnishing the capital, and making himself responsible for the debts arising out of the adventure, was surely entitled to the control over the proceeds. All the evidence shows that Gill was to act merely as broker, and not to appear as a partner; he, therefore, would not be liable to the engagements entered into in the course of the transaction. It is quite clear, therefore, that the property belonged to Sampson; the bill was his, and he paid it into the hands of the defendants, and if that be so then he alone had a right to receive the proceeds from them. But *supposing Sampson and Gill to have been partners, the latter was clearly a secret partner; and in [**412* *Ex parte Gilpin* we decided, that the statute 21 Jac. 1, c. 19, s. 11, applied to a secret partner, who permitted his share of the partnership property to continue in the possession of the bankrupt up to the time of his bankruptcy. We could not have certified as we did in that case unless we had thought that the case of *Coldwell v. Gregory* could not be supported. I was fortified in that opinion by that of the lord chancellor, in *Ex parte Dyster*. Independently of that authority I think that the decision in *Coldwell v. Gregory* cannot be supported without repealing the statute, which contains no exception in favour of secret partners. I cannot, indeed, readily conceive any case more completely within the mischief which the enactment was intended to remedy. For if a secret partnership could be set up as an answer to assignees claiming property which had been left in the order and disposition of the bankrupt, as apparent owner; enormous debts, unconnected with the partnership business, might be contracted upon the credit gained by the possession of property, which a person wholly unknown to the creditors might claim, to the exclusion of their just demands. I therefore entirely concur in thinking that there is no ground for a new trial.

Rule discharged

*413] *CASH and GOODWIN, Assignees of PACKWOOD, a Bankrupt, v. EDWARD YOUNG.

Where A. bought goods of a trader who had previously committed an act of bankruptcy, and paid for them bonâ fide without knowledge of the bankruptcy: Held, that the assignees under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 J. 1, c. 15, s. 14.

TROVER for a quantity of carpet. The first count was on the possession of the bankrupt, and the conversion was laid before the bankruptcy; second count, on the possession of the assignees. Plea, general issue. At the trial before ABBOTT, C. J., at the last London sittings in Trinity term, it appeared, that Packwood, who kept a shop at Radcliffe-highway, (a) committed an act of bankruptcy on the 13th of December, 1822, whereupon a commission issued, dated the 9th of January, 1823, and an assignment was made to the plaintiffs on the 1st of February, 1823. On the 24th of December, 1822, the defendant's wife went to the bankrupt's shop, and ordered the goods in question, which were sent home to the defendant's house, and they were paid for a few days afterwards, the shop of the bankrupt being still kept open. The plaintiffs demanded the goods on the 15th of March, 1823. The lord chief justice left it to the jury to say, whether the goods were bought and paid for, bonâ fide in the ordinary course of trade, directing them, if that was their opinion, to find for the defendant, and giving the plaintiffs leave to move to enter a verdict for the value of the goods. The jury having found for the defendant, a rule was obtained in Michaelmas term, according to the leave reserved, against which

*414] *Campbell* now showed cause. It having been found by the jury that the goods were bonâ fide bought and paid for in the ordinary course of trade, if it be held, that the plaintiffs are entitled to recover, no person can with safety buy and pay for goods any where out of the city of London. The defendant, however, is clearly protected by the equity of the 1 Jac. 1, c. 15. By the fourteenth section it was provided, "that no debtor of the bankrupt should be thereby endangered for the payment of his or her debt, truly and bonâ fide to any such bankrupt, before such time as he should understand or know that he was become bankrupt." Now the assignees could not have maintained an action for goods sold and delivered. [BAYLEY, J. Because they would thereby have affirmed the sale. *Smith v. Hodgson*, 4 T. R. 211.] The object of the statute was, to put the assignees in the same situation as if payment had been made to themselves. If they could recover in this action, the defendant would have no remedy to recover back the money paid to the bankrupt, and would, therefore, be endangered by such payment made bonâ fide. There is no real distinction between sales before or after an act of bankruptcy. At the time when the payment was made the defendant was a debtor of the bankrupt. The legislature must have contemplated the mischief of such a case as the present, and the statute has always been liberally construed. In *Wilkins v. Casey*, 7 T. R. 711, it was held to extend to an acceptance for a debt due to the bankrupt. *King v. Leigh*, 2 T. R. 141, turned upon the fact of the defendant having notice that the bankrupt was in prison. **Coles v. Robins*, 3 Campb. 183, is expressly

*415] in point for this defendant, and must be overruled, in order to give judgment for the plaintiffs. In *Hurst v. Gwennap*, 2 Starkie, 306, the only case remaining to be noticed, the goods had not been paid for, the statute therefore did not apply.

Tindal, contra. The plaintiffs are entitled to have a verdict entered in their favour. It may be admitted, that a hardship will in some cases be the consequence of such a decision; but, notwithstanding that, the court must decide what the law is, upon the proper construction of the several acts relating to bankrupts. No proposition is more clear, than that, by relation, the assign-

(a) This is not within the city of London.

ment operates from the first act of bankruptcy committed after the petitioning creditor's debt accrued. That was the case on the earlier bankrupt acts, without any exemptions whatever. To remedy the hardship arising from such a state of the law, that relation has, to a certain extent, been abridged by subsequent statutes, and the question is, whether they reach the present case. [BAYLEY, J. May not the bankrupt, under such circumstances, be considered as the agent for those who may become his assignees.] That must depend on the statute. The only thing to be considered is whether the legal property be or be not by relation in the assignees from the time of the act of bankruptcy. The argument for the defendant is founded entirely on the 1 Jac. 1, c. 15, s. 14; that section is introduced by way of proviso, and the words of it are "no debtor of the bankrupt;" in this case defendant was a debtor of the assignees, not of the bankrupt. [BAYLEY, J. Was he not quodam modo debtor of the *bankrupt, could not the latter have sued him if no commission had issued?] The preceding clause shows that "debtor of the bankrupt" [*416 means in respect of a contract made when the bankrupt was able to contract, and the fourteenth section comes by way of proviso to that. The object of the thirteenth section was, to put into the hands of the assignees all that would be assets for the payment of the creditors. [ABBOTT, C. J. Suppose a promissory note had been given to the bankrupt for the price of the goods, could the assignees have declared upon it as a note given to themselves; they might certainly have endorsed it, which shows that the property vested in them.] The 1 Jac. 1, c. 15, s. 14, was made to protect the payment of money to the bankrupt, and did not extend to the delivery of the bankrupt's goods to him after his bankruptcy. This appears from the 56 G. 3, c. 137, which was made expressly to protect the party making such delivery bonâ fide without notice of the bankruptcy. The 21 Jac. 1, c. 19, s. 14, provides that no purchaser for good and valuable consideration shall be impeached by virtue of that act, or any other act heretofore made, unless the commission issue within five years after the act of bankruptcy. That section is by way of proviso to the thirteenth, and, therefore, must be taken to apply to the purchasers of all such property as is mentioned in the thirteenth. Now that includes "lands, tenements, hereditaments, goods, chattels, or other estate." If the payment in this case had been protected by the 1 Jac. 1, c. 15, s. 14, the 21 Jac. 1, c. 19, s. 14 would have been altogether unnecessary, as far as it relates to "goods and chattels." The legislature must therefore have thought that it was not protected. Here, then, the commission having issued within five years, the purchaser is not protected; that statute still left bonâ fide purchasers under considerable [*417 hardship, and a remedy was provided by the 46 G. 3, c. 135, which protected all contracts or payments made two months before the issuing of the commission. If the court decide for the defendant in this case, they must hold, that the assignees cannot disaffirm any contracts made bonâ fide with the bankrupt, for the payment of the money makes no difference. *Copeland v. Stein*, 8 T. R. 199. [BAYLEY, J. That was decided, on the ground, that the transaction was an advance of money, and not the payment of an antecedent debt.] That was one ground, but all the reasoning of the judges is in favour of the present plaintiffs. Then, *Hurst v. Gwennap* is expressly in point, for if trover could be maintained, the delivery of the goods must have been tortious; so here, if the delivery was originally tortious, the subsequent payment would make no alteration.

ABBOTT, C. J. This is certainly a case of much importance, but considering the very small number of cases that can be found bearing upon the subject, I cannot help thinking that it has been the common opinion of those administering the bankrupt laws, as well in the higher as the lower branches, that the 1 Jac. 1, c. 15, s. 14, did extend to protect such a payment as the present. There can be no doubt as to the common acceptance of the expression, "debtor of the

bankrupt," but it has been argued, that as this section comes by way of proviso, we must look at the preceding section, which gives a remedy to the assignees to recover debts, &c., in these words, "that the commissioners or the greater
 *418] part of them shall have power to grant or *assign, or otherwise to order or dispose of, all or any of the debts due, or to be due, to or for the benefit of the bankrupt, by what person or persons soever, or in what manner or form soever, to the use of the creditors." Looking at the two sections together, can we say that this defendant was a debtor of the bankrupt within the meaning of the act. I am of opinion that we can. For, if no commission had issued upon the act of bankruptcy given in evidence, he might have maintained an action for the price of the goods. Now, if A. may sue B. for the price of the goods sold to him, is it possible for us to say that B. is not A.'s debtor? If we are to decide in this case for the plaintiffs, the mischief will be serious indeed; for it will have the effect of making every person buying any article in a shop in the city of Westminster or elsewhere, not in market overt, and paying for it immediately, liable to pay a second time. The clause in question must be considered as a remedial enactment, we should therefore, if possible, so construe it as to remedy the mischief pointed out. I was certainly much struck with the argument, that the 21 Jac. 1, c. 19, s. 14, coming by way of proviso to the thirteenth section, extended to the purchase of goods and chattels. But in the thirteenth section, they are mentioned in company with "lands, tenements, and hereditaments," and the enumeration concludes with "other estate." That section also speaks of their being conveyed on condition of repayment of money advanced, and it enables the commissioners to repay the money and have back the estate, &c. And therefore, although the words "goods and chattels" are there inserted, the section more properly applies to "real estate," and being followed by "other estate," it is probable that they were inaccurately
 *419] used to denote terms for years, rather than movable *goods. Our construction in this case does not render unnecessary that section as to real property. The 46 G. 3, c. 135, is expressed in such general terms, that no argument can, with any certainty, be founded upon it. Upon the whole, then, it seems that this is not a constrained or forced interpretation of the 1 Jac. 1, c. 15, s. 14, and it agrees with the case of *Coles v. Robins*. I am therefore of opinion, that the verdict was properly found for the defendant.

BAYLEY, J. I think that the payment in dispute is protected by the 1 Jac. 1, c. 15, s. 14; and that the assignees cannot maintain trover, without at least tendering back the money paid. There is no doubt that, generally speaking, the assignees are entitled to all the property of the bankrupt at the time of the act of bankruptcy, and may disaffirm all acts done by the bankrupt, unless prevented by some positive enactment. But if that were the rule without exception, much injustice would be worked. Until the 1 Jac. 1, c. 15, was passed, the lapse of time gave no protection, and although the bankrupt went on to trade for any length of time after he had committed an act of bankruptcy, no payments to him were protected, unless made in respect of sales in market overt. There is a well-known maxim, "vigilantibus jura subveniunt," and therefore, when an act of bankruptcy has been committed, the creditors should as soon as possible sue out a commission; but if they might take away goods afterwards sold by the bankrupt and paid for, and so obtain both the goods and the money, it would be their interest to postpone their proceedings. Then does the statute apply to this. The words of the thirteenth section are applicable, as well to goods sold after, as to those sold before an act of bankruptcy. It must therefore
 *420] be *construed to extend to debts due upon all such sales, and the meaning of the fourth section (that being by way of proviso to the whole of the thirteenth,) must be equally extensive. Was then the defendant a debtor of the bankrupt? The latter might have sued him, and under such circumstances he *bonâ fide* pays the debt. Even if he could prove under the commission, or

bring an action against the bankrupt for the money paid, still he would be endangered for the payment, and the statute says he shall not be endangered. In *Hurst v. Gwennap* there was no payment, and therefore no question could arise upon the meaning of this proviso; and in *Copeland v. Stein*, the factor advancing money did not do that as a debtor of the bankrupt, but as a mere lender of money. The facts of *Coles v. Robins* are not to be distinguished from the present. I am therefore of opinion upon that authority, and upon the reason of the thing, that this rule for entering a verdict for the plaintiffs must be discharged.

HOLROYD, J. I am of opinion that this action is not maintainable by the assignees of the bankrupt; the defendant being protected by the 1 J. 1, c. 15, s. 14, notwithstanding the sale of the goods was subsequent to a secret act of bankruptcy. The thirteenth section of that act conveyed to the assignees by assignment, the goods sold, if they chose to claim them, or the price, as for goods sold by the bankrupt in his own right, not as for goods sold by him as their agent. If that section extends to the present case, the proviso also clearly extends to it; for that protects persons making payments in respect of any ground of action included in the former section. The case of *Coles v. Robins* is directly in point, and, in my judgment, it was there rightly held, that the statute should be liberally construed. This is within the words and [*421] spirit of the act, and also within the mischief intended to be remedied. If such a payment as the present had not been protected then until the passing of the 21 J. 1, c. 19, whatever period of time elapsed between an act of bankruptcy and the issuing of a commission, the assignees might have claimed all goods sold by the bankrupt during that period, although paid for; and so have had the benefit both of the goods and the money. And after that statute, they would still have had a similar power whenever a commission issued within five years after the act of bankruptcy, until that was further limited by the 46 G. 3, c. 135. But before the issuing of a commission, the bankrupt might have sued this defendant; the latter, therefore, in paying the money, only did that which the law would have compelled him to do. Being by law compellable to pay, the payment did not make him a wrong-doer, and he is protected by the 1 J. 1, c. 15. There are cases in which it has been held that the property does not vest absolutely in the assignees for all purposes, but that the bankrupt remains quodam modo the owner. *Ashley v. Kell*, 2 Str. 1207. For these reasons I agree that this rule must be discharged. (a)

Rule discharged. (b)

(a) See *Saunderson v. Gregg*, 3 Stark. N. P. C. 72. *Semble*, contra.

(b) Best, J., was sitting at nisi prius.

*WILLIAM THOMPSON, JOHN ARMSTRONG, and RICHARD THOMPSON v. THOMAS GILES, SAMUEL GREGSON, and [*422] JOHN CHARNLEY, Assignees of the Estate and Effects of ALEXANDER ANDRADE and THOMAS WORSWICK, Bankrupts.

A customer was in the habit of endorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash-payments to him from the time when made, and upon all payments by bills from the time when they were due and paid: and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy.

THIS was an action of trover, brought by the plaintiffs to recover the value of certain bills of exchange stated and set forth in the declaration. At the trial

before ABBOTT, C. J., at the Summer assizes for Lancaster, 1822, a verdict was found for the plaintiffs for 2539l., subject to the opinion of the court upon the following case.

The plaintiffs were partners under the firm of William Thompson and Co., in a silk manufactory near Lancaster, and for many years past had kept a banking account with Thomas Worswick, Sons and Co., being the firm in which Alexander Andrade and Thomas Worswick carried on their business of bankers prior to their failure. The defendants were the assignees of Alexander Andrade and Thomas Worswick, duly chosen under a commission of bankrupt which issued on the 15th February, 1822. The bills of exchange which were the subject of the action, were received by the bankrupts as such bankers prior to their bankruptcy, on the account of the plaintiffs, and were entered in the *423] account in manner *hereinafter mentioned. They remained in the bankers' hands till their bankruptcy, when they were taken possession of by the defendants as assignees, and converted to their own use. The account of the plaintiffs with the firm of Thomas Worswick, Sons, and Co. had continued for many years, and was kept in following form in the pass-book or banking-book, and it was the course of dealing of the bank to keep the accounts in this form.

Messrs. W. Thompson and Co. in Account with T. Worswick, Jones, and Co.

Dr.				Cr.			
1821.	£	s.	d.	1821.	£	s.	d.
July 4. To bank - -	80	0	0	July 1. By balance -	1300	0	0
5. To draft - -	100	0	0	2. bills - -	750	0	0

At the end of every half-year an account was sent into the plaintiffs from the bankers. In the account at Christmas, 1821, and also in the pass-book, a bill for 689l. 16s., one of those in question in the action, was included, being one of several bills paid in on the 10th December, 1821, and it formed part of the cash balance of 941l. 2s. 5d., therein stated to be due to the plaintiffs. The mode of keeping the account with the plaintiffs and other customers of the bank was this. When the customer paid bills into the bank, such as the bankers approved of, they were never written short, but entered on the day they were paid in in the pass-book, and also in the books of the bank, to the credit of the customer, in the form above stated, and after such entry the customer was at liberty to draw to the full amount, appearing to his credit, by checks on the bank. Bills *424] disapproved of *were not so entered, but were sometimes returned, sometimes deposited till due. All bills so entered, whether made specially payable to the customer or not, were endorsed by him, or if for any private reasons he did not wish his name to appear on the bills, a letter was given to the bank, acknowledging himself to be equally liable as if he had endorsed. An interest account was kept, not in the pass-book but in the bank-books, in which the customer was debited with interest, on each cash payment to him, from the date of the payment, and on each payment in bills from the period when the bills were due and paid; and on the other hand he had credit for interest from the date of each cash payment by him, and from the period when each bill paid in by him became due and was paid. As the accounts were balanced half-yearly, if a bill was paid in which did not become due before the end of the half-year, the customer was debited with the interest up to the time when the bill was due. The balance only of the interest was entered in the pass-book, and this was the usual mode of keeping an interest account. If only the undue bills paid in by the plaintiffs were taken out of the account, made up to the 31st December, the plaintiffs' account would at that date appear to be

overdrawn; but some of the payments made by the bankers to the plaintiffs, were made in bills payable at future times, and some of these also were undue on the 31st December; and if all the undue bills on both sides had been taken out of the account, made up to the 31st December, the plaintiffs would have been made creditors on that account. At the period of the bankruptcy, the cash balance was in the favour of the plaintiffs, exclusive of the bills in question. It was proved to be the constant usage and course of dealing of this bank, and of others in the *county of Lancaster, to use bills so paid in by [*425 paying them away to their customers as they thought fit. The bank of Worswick and Co. were in the habit of paying away such bills to their customers almost every day and hour, and to the amount of many thousands every week; and the circulation of the town of Lancaster and the county at large was conducted in a great measure by bills so paid in, and afterwards paid away by the bankers; and if that had not been done, each bank would have required an immense unemployed capital of bank notes, or have been obliged to draw on their correspondents in London, and thereby considerably increased their expenses. This proof was objected to by the plaintiffs' counsel, but was received, subject to the opinion of the court as to its admissibility. No direct proof was given that the plaintiffs were acquainted with this practice; and the plaintiffs never received any thing from the bankers but cash notes and bills drawn by the bankers upon their London agents.

F. Pollock, for the plaintiffs. The bills sought to be recovered in this action were entered as bills and not as cash to the credit of the plaintiffs; they remained in specie in the hands of the bankers at the time when they became bankrupts, and may therefore clearly be claimed by the plaintiffs. A banker is a factor for money. That was established by *Giles v. Perkins*, 9 East, 12, which was afterwards acted upon in *Hughes v. Spooner*, (a) tried before BEST, J., at Warwick. From that time this has been universally considered as the law, and the commercial world have been governed by it. That alone would be sufficient to make the court pause before they *overturned the decision, even if [*426 the propriety of it were not apparent, but it is, in fact, supported by a series of earlier cases, *Ex parte Dumas*, 1 Atk. 232, 2 Ves. sen. 582, S. C.; *Zinck v. Walker*, 2 Bl. 1154. In *Bolton v. Puller*, 1 B. & P. 539, the same rule was recognised as law, and that case proceeded entirely on the ground, that the banker had negotiated the bills. The reason for holding, that bills in the hands of a banker do not pass to his assignees, is explained by BULLER, J., in *Bryson v. Wylie*, (b) where he observes, that by the course of trade bankers and factors have the goods of other people in their possession, and therefore it does not hold out a false credit to the world.

Parke, contra. This is merely a question of fact, and not of law. It is perfectly clear, that where a banker, employed as an agent to receive bills when due, becomes bankrupt, having the bills entrusted to him remaining in specie in his hands, they continue the property of the customer, and do not pass to the assignees. But if, on the other hand, bills are remitted to him on the general account, and are not distinguished from the cash items, then they cannot be reclaimed by the customer. *Ex parte Oursel*, Amb. 297; *Ex parte Serjeant*, 1 Rose, 153; *Ex parte Pease*, 1 Rose, 240; *Ex parte Wakefield Bank*, 1 Rose, 243, were mere applications of this rule of law to the facts of those cases. If the relation of principal and agent subsisted between these plaintiffs and the bankrupts, then the former must recover, but if that of debtor and creditor then they have no right of action. [HOLROYD, J. If the relation of debtor and creditor subsisted, the *customer might have sued the banker for the amount of the [*427 bills, as soon as they were entered to his credit.] It is to be inferred from the mode of dealing, that the customer was immediately entitled to draw

(a) Not reported.

(b) In a note to *Lingham v. Biggs*, 1 B. & P. 82.

for cash to the amount of the bills. Then it is found that the bankers in the county of Lancaster, and particularly the bankrupts, were in the habit of using the bills paid in as their own; and that practice being well known, it must be presumed that the plaintiffs assented to it, as they never gave any directions to the contrary. Unless the custom was such as to authorize the using of the bills, the bankers would be liable to the penalties imposed by 52 G. 3, c. 63, which enacted that bankers and others, applying to their own use bills and other property deposited with them, under certain circumstances, and for certain purposes, shall be deemed guilty of a misdemeanor, and be transported for fourteen years, or receive such other punishment allowed by law in cases of misdemeanor, as the court before whom the party is tried shall adjudge. Yet it could never be said that the acts of the bankrupts in this case were within the meaning of that statute. [BAYLEY, J. If they disposed of the bills in the manner stated, knowing themselves to be on the eve of a bankruptcy, they would not, I think, be free from danger.] There was also evidence of a mode of dealing, when the bankers did not choose to treat the bills as cash, different from that adopted with respect to the bills in question, which confirms the idea that they were treated as cash. *Giles v. Perkins* is certainly an authority for these plaintiffs, if that is to be taken as deciding, as an abstract proposition of law, that a banker is always to be considered as an agent. It has not, however, been so construed, for the most important decisions on the point have arisen since, and *428] the lord chancellor *in them has taken great pains to ascertain from the evidence what bargain was in each case made between the parties. *Ex parte Serjeant, Ex parte Pease*. The court in this case are placed in the situation of a jury, and may, therefore, decide upon the facts before them, without feeling bound by former decisions. [BAYLEY, J. In *Giles v. Perkins* it was found that the bills were entered as cash.] Here one bill for 689*l.* was certainly treated as cash; it was in effect discounted, for in the half-yearly account the customer was charged with interest, and made no objection. But supposing the bankers to have been agents only, still, if they had had the assent of the customer, that they should use the bills as they pleased, they were in their order and disposition, and passed to their assignees under the 21 J. 1, c. 19, s. 11, the bankrupts not being factors within the meaning of the exception in that statute.

BAYLEY, J. I quite agree with the observation, that this is rather a question of fact than of law. But if the circumstances are such as enable us to say, without difficulty, what ought to be the verdict of a jury upon them, we are at liberty to decide the question, when thus brought before us in a special case, although in a special verdict all the facts must be found. It has been argued for the defendants, that we must infer an agreement to have been made between the banker and his customer, that as soon as bills reached the hands of the former, the property should be changed. Undoubtedly, if there were any such bargain, the defendants would be entitled to our judgment; but if there be no such bargain, then the case of customer and banker resembles that of principal and factor, and the bills remaining in specie in the banker's hands will, notwithstanding the bankruptcy, *429] continue the property of the customer. *Scott v. Surman*, Willes, 400, and *Bolton v. Puller* establish that as a general rule. That being so, is it probable that such a bargain as that suggested would be made? What benefit would the customer derive from having the bills considered as the property of the banker? In the absence of any valuable consideration, it seems to me that it would be very unreasonable in a banker to ask, and very imprudent in a customer to accede to such terms. I should not, therefore, be disposed lightly to infer such a contract. But it is said, that it must be inferred from the course of dealing between the parties, and from the usage of the bankrupts, and other bankers in the county of Lancaster. It appears, however, that the bills were not entered as cash, but as bills, and although the amount was carried into the cash column, it does not follow that the cus-

customer assented to their being considered as cash. It is only an undertaking on the part of the banker to answer drafts in advance to the amount of the bills so entered. By endorsing the bills paid in, or by giving a guarantee when he did not choose to endorse, the customer might enable the banker to negotiate the bills, and a bona fide holder might have a right to retain them. But the banker could only be justified in negotiating them when that was rendered a reasonable course by the state of the customer's account. The case, indeed, states it to have been the custom of bankers in the county of Lancaster to use bills paid in by their customers, but it does not state that they so used them as their own, without reference to the customer's account. The cases arising out of Bolderos's bankruptcy, *which have been referred to, *Ex parte Pease*, *Ex parte Wakefield Bank*, were not ordinary cases between banker and customer, [*430 but between a country banker and a paid agent in London. The lord chancellor so considered them, and was therefore under the necessity of examining the facts minutely, in order to ascertain what was the real bargain. *Ex parte Serjeant* comes nearer to this than any other case that has been cited, but still there is a plain distinction between them. There the bills and cash were entered in the running account, without distinction, here credit is given for bills, the items on the face of them appear not to be cash. This case is, therefore, much stronger for the plaintiff than *Ex parte Serjeant* was for the petitioner, yet even there the lord chancellor appears to have thought that the customer was entitled to the bills. At all events that case shows, that even where bills are entered as cash, the assent of the customer to their being so considered must be proved, and that the onus of proving it lies on the banker. Upon the whole, then, I am of opinion that there is no foundation for supposing that a bargain had been made enabling the banker to use as his own the bills deposited with him. That is a bargain of such a nature as ought not to be presumed without strong evidence. An attempt was made to show that one bill for 689*l.* stands on a different footing from the rest, because the discount of it was taken into account in settling the balance of interest at the end of the half-year preceding the bankruptcy. But the explanation given of the mode of keeping the interest account rebuts any inference of an intent to discount that bill which might otherwise have been drawn from the entry alluded to. The plaintiffs are, therefore, entitled to *recover the amount of all those bills that remained in the [*431 hands of the bankers at the time of their bankruptcy.

HOLROYD, J. I am of opinion that the bills in question did not, under the circumstances of this case, become the property of the bankers, and that the defendants, therefore, have not any sufficient answer to this action. It is perfectly clear, as a general rule, and indeed is not disputed on the present occasion, that if a customer pay bills into a banker's hands, although it gives him a right to expect that his drafts will be honoured to the amount of the bills paid in, yet the property in the bills is not altered; they still remain the property of the customer, although the banker may have a lien to the extent of his advances. The defendants must, therefore, show such special circumstances as will operate to change the property, and vest it in the assignees, either as standing in the situation of the bankrupts, or by virtue of the 21 Jac. 1, c. 19, s. 11. There is not, I think, sufficient stated in the case to sustain either of those positions. There can be no doubt that the bills were placed in the bankers' hands, in order that he might receive the money upon them when due, but they were not in his order and disposition, and, therefore, not within the 21 Jac. 1, c. 19. Can we then say that these bills have, either by operation of law, or by facts raising a conclusion of law, become the property of the bankrupt? The facts stated would not justify such a finding by a jury. In *Giles v. Perkins*, and the case cited, which was tried before my brother BEST, it was held, that an entry of bills as cash was not of itself sufficient to convert the property. The full amount too of the bills appears, in this instance, to have been entered in the

*432] cash column. Now it is *hardly to be supposed, that the bankers intended to debit themselves presently with the whole sum that was to be received in future. In order to change the property, it must be shown that the bankers bought the bills, or discounted them, which is indeed the same thing: then the customer might have immediately sued the bankers for the price which they agreed to give for the bills, but still retained in their hands; and if the customer did not endorse the bills, and they were afterwards dishonoured, the bankers, under such circumstances, would have no remedy against him. Is there sufficient in this case to show that the bills were either bought or discounted by the bankers, so as to make the price the property of the customer? They were entered as bills, not as cash, and even if the latter mode of entry had been adopted, it would still, according to *Giles v. Perkins*, admit of explanation. In what light does the banker appear to have considered them in his half-yearly account? In the pass-book they are entered at the full amount; that would not show that they were discounted. In the interest account interest upon the amount is charged upon each bill until it was actually paid; but when a bill is discounted the interest to be deducted is calculated up to the time when it becomes due, and for no longer period. This, then, is not so strong a case as *Giles v. Perkins*. An argument for the defendants has been founded on the circumstance, that the bankers required either an endorsement of the bills, or a guarantee; that was not because they took the property in the bills, but that they might be able to negotiate them as soon as the customer's account rendered such a step necessary. This is said to be a question of fact rather than law. It may be so, but I think that the facts proved were not sufficient in law to change the *433] property; and *I doubt much whether there was sufficient to enable a jury to find that the customer assented that the bills should become the property of the banker. If that had been intended they would have been entered as cash, deducting the discount. Upon the general question, therefore, I think that there must be judgment for the plaintiffs, and I am unable to discover any real distinction between the right to the bill for 689*l.*, and the others remaining in the hands of the bankrupts at the time of their bankruptcy.

BEST, J. I agree entirely with the opinion expressed by my learned brothers in this case. It is perfectly clear that, if a person places in his bankers' hands bills not due, the property continues in the party paying them in. If by any accident they were destroyed, without the default of the banker, the loss would not fall upon him, but upon the customer. As the property continues in the customer, and as it is well known that bankers receive bills as factors or agents, to obtain payment of them when due, they do not, in case of bankruptcy, pass to the assignees by the 21 J. 1, c. 19, s. 11. Bills may be paid in under such circumstances as would furnish evidence of a transfer of the property; but that has been properly treated as a question of fact. The only fact in this case upon which the defendants can rely, and which did not exist in *Giles v. Perkins*, is the custom prevailing amongst the bankers in the county of Lancaster. I much doubt whether evidence of that custom could be received in this case. The property of one person is not to be affected by agreements made between others. The only question here was, how far the plaintiffs assented to give the bankers *434] an absolute control over their bills. There is not a single *expression in the case to show such assent. The 52 G. 3, c. 63, furnishes a strong argument against these defendants, for it shows that the legislature thought it extremely improper for bankers or others to negotiate bills (amongst other securities) entrusted to their care. I do not mean to say that the bankers in this case incurred any of the penalties imposed by that act; it is unnecessary to decide that point here; but I would by no means advise persons in their situation to take it for granted that they may with impunity act in the same manner.

Postea to the plaintiffs.

BULKELEY and Others v. BUTLER (in Error).

In an action by the endorsee, against the acceptor of a bill of exchange, whereof E. S. was the payee, the plaintiff proved that a person calling himself E. S. came to C., having in his possession the bill in question, and also a letter of introduction, (proved to be genuine,) which was expressed to be given to a person introduced to the writer as E. S., and also another bill of exchange, drawn by the writer of that letter. The bearer of these documents, after remaining ten days at C., during which time he daily visited the plaintiff, endorsed to him the bill in question and received value for it, and also a letter of credit. *Held* that this was evidence of the identity of this person with E. S. the payee of the bill, &c., in the absence of any evidence in answer, sufficient to justify a verdict for the plaintiff.

ASSUMPSIT by the first endorsee against the acceptors of a foreign bill of exchange, drawn by J. Bulkeley and Son, dated Lisbon, August 6th, 1816, upon the defendants in London, payable to the order of Edmund Shanahan, and by him endorsed to the plaintiffs. Plea, general issue. At the trial before DALLAS, C. J., of the common pleas, at the London sittings after Trinity term, 1821, the defendants contended, that there was not any evidence to show that the bill was endorsed by E. S., the payee. The lord chief justice thought that there was evidence fit for the consideration of the jury, whereupon the defendants tendered a bill of exceptions. The jury found a verdict for the plaintiff below. The record, when brought into this court by writ of error, after setting out the pleadings and continuances, stated, that on a certain day the cause came on [435] to be tried, and that one W. Barron was produced and examined as a witness for the plaintiff, and stated, that in the month of August, 1816, he was a clerk in the house of the plaintiff, at Cadiz. That on the 10th of August, in the same year, a person calling himself Edmund Shanahan, came to the plaintiff's house at Cadiz, and produced a letter of recommendation (which was then produced by the witness, and read for the plaintiff,) in consequence of which the plaintiff received and entertained him. The letter was as follows: "Lisbon, 29th July, 1816. Sir, this will be handed to you by Edmund Shanahan, Esq., who in his travels through Spain on commercial pursuits, will pass some days at your city. This gentleman has been introduced to us by a very particular friend, and we take the liberty to recommend him to you, and to request that you give him every necessary information to guide his operations, &c. Signed, M'Donnell, Brothers, and Co." The witness further stated, that he knew M'Donnell and Co., and that the letter was their handwriting. On cross-examination, he said that he knew the said E. S. then (when he presented the letter) but not before. Being further examined in chief, the bill declared upon being shown to him, he said that he first saw it produced by the person calling himself E. S., who had been in Cadiz from the 10th to the 19th of August, that he had seen him during that period ten or twelve times, and dined with him at the plaintiff's house every day between the said 10th and 19th of August; that on the 19th of August the person calling himself E. S. produced the bill, and said that he had come from Ireland with goods which he had sold in Lisbon, and the produce [436] of them he had brought in bills, which he then requested the plaintiff to forward for acceptance, and that he should probably require some of the money on that day; the said person, calling himself E. S., left the said bill unendorsed, together with others, with the plaintiff, on the 19th of August, and returned again on the 20th, and then asked the plaintiff to negotiate the said bill on his own account, and that he should require the money at Gibraltar; that the said person calling himself E. S. endorsed the bill and gave it to the plaintiff, who advanced to him a sum of money exceeding the amount of the bill, and also gave him a letter of credit on Gibraltar. Being further cross-examined, the witness stated, that when the said bill was delivered to the plaintiff by E. S., he also delivered another bill for 640*l.*, purporting to be a bill drawn by M'Donnell, Brothers, and Co., which the witness knew to have been subscribed by one of the partners in that firm, and that it had been refused payment on the ground

of forgery ; and that he (witness) knew nothing more of the person calling himself E. S., than that he came with the letter of recommendation above mentioned, and that he had never seen him since the said 20th day of August ; that at the time when the witness first saw the said bill, upon which the action was brought, he well knew the name, J. Bulkeley and Son, subscribed to it to be in the handwriting of one of that firm ; and thereupon no other evidence being adduced of the person calling himself E. S. being the payee of the said bill in the declaration mentioned, the counsel for the defendant objected to the evidence so given as aforesaid by the said plaintiff, in support of the said issue joined between the said parties, that there was no proof to go to the jury of the identity of the said person, calling

*437] himself E. S. with the said E. S., the payee of the said bill, and then and there prayed the said chief justice, that he would declare to the jury that there was no evidence before them of the endorsement of the said bill of exchange by the payee therein mentioned. Yet the said chief justice did then and there declare and deliver his opinion to the jury aforesaid, that although in law there should be some proof of the identity of the person making the endorsement, still it ought not to be so rigidly followed up as to clog the negotiability of bills of exchange, so that no person would take one. That, therefore, the question for the said jury to consider was, whether there was or was not sufficient evidence of identity in this case to satisfy them, there being none to the contrary, nor any evidence of there being any other person of the name of E. S. connected with the bill ; that the circumstance of the person calling himself E. S. having produced to the plaintiff and the witness the genuine letter of recommendation or introduction, and the bill of exchange actually subscribed by J. Bulkeley and Son, and by McDonnell, Brothers and Co., whose firms and handwriting were known at the time to the plaintiff, were material to prove the identity. And the said chief justice did further deliver his opinion, that the said evidence above set forth was reasonable evidence to be left to the jury, to be by them considered, whether the said endorsement was the endorsement of the person to whom the said bill was made payable ; and thereupon, with that direction, left the same to the jury, who declared themselves to be satisfied of the identity of the said E. S., concluding in the usual form. The case was now argued by

*438] *Wilde* for the plaintiff in error. There was not any evidence to be left to the jury as tending to identify the payee of the bill, Edmund Shanahan, with the person who endorsed it. It may be admitted, that if any one fact given in evidence tends to prove that identity, the judgment must be affirmed. All the evidence given was admissible for other purposes, but was not competent evidence on this part of the case ; the only witness to this point was Barron, who, at the time of the endorsement, was clerk to the plaintiff. He merely proves that a person calling himself E. S., but whom the witness did not know before, came to the plaintiff's house at Cadiz, and there produced and endorsed the bill. [BAYLEY, J. He had documents with him which no one but E. S. ought to have had.] Bills of exchange may, for a variety of purposes, be innocently in the hands of other persons than the owner. If possession is sufficient, then in any case a person may pass a bill by endorsing on it the name of the payee. [BEST, J. Proof of the identity of a party endorsing is never required in ordinary cases.] In many cases evidence of the handwriting carries with it evidence of the identity, for the party is known to have passed in public by the name which he endorses. But if, indeed, there had been any evidence that the person calling himself E. S. had been generally known by that name, that would have thrown upon the defendant the onus of showing that he was not the real payee, as in *Mead v. Young*, 4 T. R. 28. That burthen ought not to have been imposed, unless a strong case had been made out on the other side ; for foreign bills are frequently drawn in favour of

persons who *are not known either to the drawer or acceptor. Suppose the case of an indictment, in which it would be necessary to prove [*439 that the defendant was E. S., would that be done by showing that he was in possession of a bill payable to E. S.? Or suppose an action against E. S., and a plea in abatement and issue thereon, would the identity of the party be made out by showing that such a document was in his possession? What this person told the plaintiff cannot be evidence, neither can what the plaintiff did be evidence, for this purpose; he might receive the man as E. S., but there is no evidence that any one else did. It may prove that he acted *bonâ fide*, but does not carry the case beyond that: neither does the letter of introduction tend to prove that the bearer was E. S. In order to give it that effect it should first have been shown that the bearer had been at Lisbon. The letter itself is only a statement *à priori* that something would be done (*viz.* that E. S., was coming to Cadiz) which might be defeated, and still further, the writer does not affect to speak from his own knowledge, but merely states, that some other person had informed him that a particular individual was E. S. It might be proved as part of the *res gestæ*, that such a letter was produced to the plaintiff, but that did not make the contents evidence; the writer should have been called to speak to them, and then he might have been cross-examined. There is no evidence that he ever acted upon the introduction, further than by writing that letter; no evidence that the bearer of it had been at Lisbon, or was the person introduced to M'Donnell. This surely was not the best evidence that was within the reach of the party, and that is the evidence which, according to the rules of law, he should have *been called upon to give. Phillipps on Evidence, p. 206, 6th edit.(a) In the same book, there is a rule cited [*440 from Beccaria, c. 14, that where proofs are dependent on each other, if the ground-work fails, the superstructure must fall. Now the whole of this case depends on the question whether the person introduced to M'Donnell was or was not E. S. There is no evidence that he was, and, therefore, the whole falls to the ground:—no reason was given for not calling M'Donnell. But supposing this to have been evidence fit to be left to a jury, it should have been left to them simply as a question, whether the identity of E. S. was or was not made out. Now in all cases the same evidence of the same fact should be required; but another rule was given by the lord chief justice; he declared, that although there should be some proof of identity, still it ought not to be so rigidly followed up as to clog the negotiability of bills of exchange, so that no person would take one. [BAYLEY, J. Your exception came before that; your contention was, that there was nothing to be left to the jury.] The whole appears upon the record which is brought here by writ of error; the court, therefore, must deal with the whole, and pronounce that judgment which will be right upon the whole record.

Chitty, for the defendant in error, was stopped by the court.

BAYLEY, J. I am of opinion that this case does not admit of any reasonable doubt. Three questions arise, *Was the evidence admissible to prove the identity of E. S.? Was it sufficient for that purpose, and was there any [*441 thing improper in the direction of the judge so as to warrant the court in directing a *venire de novo*? As to the first question, there is a good deal of fallacy in supposing that the letter was admitted as evidence of its contents. If it were necessary to decide that it was admissible for that purpose, I should hesitate before I acceded to such a proposition. But the possession of that letter, together with the other circumstances proved in the case, was evidence fit to be left to the jury as to the identity of E. S. If a person has in his possession a document which ought to be in the hands of the owner, that raises a presumption that he is the right owner. Here then there was a bill proved to be genuine,

(a) See *Williams v. E. I. Company*, 3 East, 192.

payable to E. S., a thing of value, and likely to be in the possession of the owner ; possession that, therefore, raised a presumption of ownership. But the person who endorsed the bill was in possession of another document, the letter of introduction, also proved to be genuine, which ought not to have been in the possession of any person but E. S. I certainly do not much rely on the possession of the bill for 640*l.*, because it did not appear to whom it was made payable. But independently of that, the endorser of the bill in dispute appears to have been in possession of two documents which belonged to E. S. I quite agree that a bill may, in many cases, be in the hands of another than the owner, but in the absence of all evidence, that the bill had got out of the hands of the right owner, possession is evidence of ownership. But the proof of identity does not *442] stop here. The party came *to Cadiz on the 10th of August, gave the letter of recommendation to the plaintiff on that day, and remained at that place until the 19th without producing the bill in question. No evidence was given as to his general conduct at Cadiz, neither party thought proper to inquire into that, but it was shown that he dined at the plaintiff's every day, where he might at any time have been seen by other persons. Between the 10th and 19th nothing passed calculated to excite a suspicion that this person was not E. S., and then he produces the bill to the plaintiff, leaves it with him until the following day, when he gets cash for it and also a letter of credit. The whole evidence of identity then is, that a person calling himself E. S. comes to Cadiz, and remains there for a considerable period of time, in which he might probably have been detected had he been committing a fraud ; he has in his possession a bill the property of E. S., and a letter of recommendation given to a person introduced at Lisbon as E. S. I cannot bring myself to doubt that this was admissible evidence to be left to the jury. Then was it sufficient to warrant the verdict found ? In order to judge of that we must look at what was proved on one side, and what might have been, but was not proved on the other. If the bill in question was not endorsed by the payee, but by some other person assuming his name, the payee would have been a competent witness to show how the bill got out of his possession. But it has been said, that the drawers of the bill might not know the payee, or where he was to be found ; that may sometimes be the case, but not often, and is not to be presumed. The defendants had ample time to seek for evidence, for although the bill was due in November, 1816, the action was not tried till 1820. *I think, therefore, *443] that the jury arrived at a reasonable conclusion from the evidence submitted to them. Then was the direction of the lord chief justice correct in point of law ? I think it was, the law does not require such evidence of identity as would clog the negotiability of bills of exchange ; the law requires such evidence as may reasonably satisfy the minds of the jury ; and if the arguments which we have heard to-day, as to the necessity of the best evidence, were pressed at the trial, it was most proper for the judge to guard the jury against any misconception on that point. Upon the whole, therefore, I think that the judgment given below was correct and must be affirmed.

HOLROYD, J. This appears to me to be a very plain case, nor have I been able to raise in my mind a doubt upon either of the points open to our consideration upon the bill of exceptions ; nor upon the propriety of the direction given by the judge, nor upon the finding of the jury, which indeed do not appear to be questions with which we are called upon to deal. The real question was, whether this evidence was or was not admissible, either as containing the declarations of persons who were not called as witnesses, or as having no tendency to prove the matters in issue. If the objection was known *à priori*, it should have been made before the evidence was given, but if it was not discovered until afterwards, then the judge should have been requested to strike the evidence out of his notes, and if after that he persevered in summing it up to the jury, that would have been a good ground for tendering a bill of exceptions.

But if, as appears to me to have been the case, the contention was whether, admitting *the facts deposed to, they tended to prove the issue, there should have been a demurrer to the evidence. That the evidence was admissible, is clear, for reasons which I shall state very shortly after what has fallen from my brother BAYLEY. The thing to be proved was, that the bill was endorsed by E. S. To establish that, the circumstance that the holder of the bill passed by the name of E. S. at Cadiz, was *prima facie* evidence; and he did not pass by that name merely in the transaction of discounting this bill, but for other purposes also. If then there was any thing to show that the name of the person endorsing was E. S., *Mead v. Young* applies, and the defendant should have shown that he was not the right E. S. I do not say that the mere possession of the bill would have been sufficient, but in addition to that he produced a letter, which was proved to be genuine, which would in all probability be given to E. S. The letter was not evidence of the facts stated in it, but was evidence that the party producing it passed at Cadiz by the name of E. S. He remained ten days at that place, which was not like the conduct of a person committing a fraud or forgery. At the end of that time he puts the bill in question, together with others, into the hands of the plaintiff, obtains from him more than the value of them, and also a letter of credit to Gibraltar. He was not then treated as E. S. with reference to the endorsement of this bill alone, but throughout the whole of that transaction. I think this was *prima facie* evidence of his identity with the payee of the bill, and that it was sufficient to justify the verdict found by the jury, as the defendants did not give any evidence to show the existence of another E. S. Then, as to the direction given by the lord chief justice, I *agree in all that has been said by my brother BAYLEY, supposing the question be open to us, but the bill of exceptions [*445 does not object to that direction.

BEST, J. The question appears so clear, that I certainly should abstain from saying any thing upon it, were it not for the importance of all matters touching the law of evidence. At first I entertained a doubt, whether the objection-raised could be taken advantage of by bill of exceptions. The respective offices of bills of exceptions and demurrers to evidence have not been very distinctly understood, as appears by the judgment of EYRE, C. J., in *Gibson v. Hunter*, 2 H. Bl. 187. It appears to me now, that this objection is open on a bill of exceptions, but that the party making it should not be placed in a better situation than if he had demurred to the evidence. Bills of exceptions were not known to the common law, but were introduced by the 13 Edw. 1, c. 31. Until that time, if the judge decided wrongly upon any point of law, the suitor was without remedy. The statute was made to relieve parties from that hardship, it should therefore receive a liberal exposition; for which reason, although it appears to have been applicable originally to decisions upon pleadings only, (which at that time were carried on *ore tenus*,) yet I think it may fairly be extended to such a case as the present. In the 2 Inst. p. 427, Lord COKE says it extends to cases where any material evidence given to any jury is by the court overruled. I think we ought to go further, and say, that where there is not evidence to prove the issue to be tried, and the judge tells the jury there is, that is *ground for tendering a bill of exceptions. But it may be asked what then is the office [*446 of a demurrer to evidence? It is this. If the party tenders a bill of exceptions, the evidence must be left to the jury; but if the party does not wish that, he may withdraw it from their consideration by a demurrer. If, however, he does not demur, he must not be placed in a better situation than if he did. Now, by a demurrer to evidence, all the facts of which there is any evidence are admitted, and all conclusions which can fairly and logically be deduced from those facts. Is there then any fact stated upon this record from which the jury might presume that the bill in question was endorsed by E. S., the payee, supposing such fact to have been properly proved? If there be any one such fact, all question

is at an end. Now I think that there is one fact showing that the endorser was E. S., putting all the other evidence out of the case, and admitting that the letter of McDonnell and Co. was not evidence, (although I concur with my brother BAYLEY in thinking that it was properly received.) If a man comes to me having in his possession a letter brought from York, that is *prima facie* evidence that he brought it. Now, the person calling himself E. S. at Cadiz, produced there a bill brought from Lisbon, and which was the property of E. S., that raises a presumption that he brought it from Lisbon, and from the mere possession, it might be inferred that he was the owner E. S. Had any proof been given that the bill had been lost, or improperly obtained from the owner, that would have rebutted the presumption. There was ample time to procure evidence of that, if the fact were so, but nothing of the kind was proved. It has been asked, however, whether *the possession of bills by clerks or bank-
 *447] ers raises a presumption of ownership; certainly not, there the character of the holder rebuts the presumption. There is nothing here to rebut it, and therefore the proof given becomes cogent evidence. It was also urged, that the best evidence should always be given. The principle is correct, but the application wrong. Of every fact, you must have the best evidence that the party has within his reach, but when one fact is well proved, another may be inferred from it. From proof that a bill came from London, it may be inferred that the bearer brought it thence. From one act distinctly proved, a custom may be presumed in the absence of all conflicting testimony. *Roe d. Bennett v. Jeffery*, 2 M. & S. 92. I agree also, that where there are several facts depending upon each other, if the evidence fails as to one, the whole falls to the ground. But here, all the facts are independent of each other, and I think the case may be rested upon the simple fact of the possession of the bill by the person who endorsed it. That certainly was evidence to be left to the jury, and in the absence of any thing to rebut the inference arising from that evidence, I think that their finding was correct. The judgment pronounced below must therefore be affirmed.
 Judgment affirmed.

*448] *JOHN FORBES v. Sir ALEXANDER INGLIS COCHRANE,
 Knight, and Sir GEORGE COCKBURN, Knight.

Where certain persons, who had been slaves in a foreign country where slavery was tolerated by law, escaped thence and got on board a British ship of war on the high seas: *Held*, that a British subject, resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship for harbouring the slaves after notice.

THE declaration stated that the plaintiff was lawfully possessed of a certain cotton plantation, situate in parts beyond the seas, to wit, in East Florida, of large value, and on which plantation he employed divers persons, his slaves or servants. The first count charged the defendants with enticing the slaves away. The second count stated, that the slaves or servants having wrongfully and against the plaintiff's will, quitted and left the plantation and the plaintiff's service, and gone into the power, care, and keeping of the defendants; they, knowing them to be the slaves or servants of the plaintiff, wrongfully received the slaves into their custody, and harboured, detained, and kept them from the plaintiff's service. The last count was for wrongfully harbouring, detaining, and keeping the slaves or servants of the plaintiff after notice given to the defendants that the slaves were the plaintiff's property, and request made to the defendants by the plaintiff to deliver them up to him: plead not guilty. At the trial before ABBOTT, C. J., at the London sittings after Trinity term, 1822, a verdict was found for the plaintiff, damages 3800*l.*, subject to the opinion of the court on the following case.

The plaintiff was a British merchant in the Spanish provinces of East and West Florida, where he had carried on trade for a great many years, and was

*principally resident at Pensacola in West Florida. East and West Florida were part of the dominions of the king of Spain, and Spain was in amity with Great Britain. The plaintiff, before and at the time of the alleged grievances, was the proprietor and in the possession of a cotton plantation, called San Pablo, lying contiguous to the river St. John's, in the province of East Florida, and of about one hundred negro slaves whom he had purchased, and who were employed by him upon his plantation. The river St. John's is about thirty or forty miles from the confines of Georgia, one of the United States of America, which is separated from East Florida by the river St. Mary, and Cumberland island is at the mouth of the river St. Mary on the side next Georgia, and forms part of that state. During the late war between Great Britain and America, in the month of February, 1815, the defendant, Vice-admiral Sir Alexander Inglis Cochrane was commander-in-chief of his majesty's ships and vessels on the North American station. The other defendant, Rear-admiral Sir George Cockburn, was the second in command upon the said station, and his flag-ship was the Albion. The British forces had taken possession of Cumberland island, and at that time occupied and garrisoned the same. The Albion, Terror Bomb, and others of his majesty's ships of war, formed a squadron under Sir George Cockburn's immediate command off that island, where the headquarters of the expedition were. Sir Alexander Cochrane was not off George during the war, and at the time of the capture of the island he was at a very considerable distance to the southward of Cumberland island, but Sir George Cockburn was in correspondence with him while he was at the said island. In the year 1814, a *proclamation had been published by the said Sir Alexander Cochrane as such commander-in-chief, and Sir George Cockburn had received great numbers of copies thereof whilst the ships under his command were lying off the Chesapeake, and distributed them at the Chesapeake and amongst the different ships, but none were distributed by the order of the defendant, Sir G. Cockburn, to the southward of the Chesapeake, the southern extremity of which is full 400 miles distant from Cumberland island. The proclamation stated that it had been represented to him, Sir A. Cochrane, "that many persons then resident in the United States had expressed a desire to withdraw therefrom, with a view of entering into his majesty's service, or of being received as free settlers into some of his majesty's colonies; and it then notified, that all those who might be disposed to emigrate from the United States would, with their families, be received on board his majesty's ships or vessels of war, or at the military posts that might be established upon or near the coasts of the United States, when they would have their choice of either entering into his majesty's sea or land forces, or of being sent as free settlers to the British possessions in North America or the West Indies, where they would meet with all due encouragement." One of these proclamations was seen on Amelia Island, East Florida, which is less than a mile from Cumberland island, and about thirty miles from San Pablo plantation. In the night of the 23d February, 1815, a number of the plaintiff's slaves deserted from his said plantation, and on the following day thirty-eight of them were found on board the Terror Bomb, part of the squadron at Cumberland island, and entered on her muster-books as refugees from Saint John's. It was reported that they *came from Seaward, they were mixed with other refugees, and they all spoke English. On the 26th of the same month of February, Sir George Cockburn received from the plaintiff a memorial, stating, that the plaintiff had been a resident in the Spanish provinces of East and West Florida for nearly thirty years, as clerk and partner of a mercantile house established under the particular sanction of the Spanish government for the purpose of trade with the southern nations of Indians, and which they were allowed to continue by special permission from his Britannic majesty, pending the two Spanish wars that occurred during that period. The said mercantile house had acquired considerable pro-

perty in these provinces, and particularly that the plaintiff possessed in East Florida a cotton plantation on the river St. John's, of which he was sole proprietor, and held the same with upwards of one hundred negroes at the period of the invasion of the state of Georgia by his Britannic majesty's forces under the command of him, Sir G. Cockburn, in January preceding; that on the night of the 23d instant, sixty-two of his said negroes deserted from the plaintiff's plantation, (together with four others belonging to Lindsay Tod, his manager,) of whom he had found thirty-four, namely, eighteen men, eight women, and twelve young children of both sexes, together with the aforesaid four negroes belonging to Mr. Tod, on board of his majesty's ship *Terror*, Captain Sheridan. But that the said slaves refused to return to their duty, under pretence that they were then free, in consequence of having come to this island in possession of his Britannic majesty. The plaintiff therefore prayed, "that the defendant, Sir G. Cockburn, would order the said thirty-eight slaves to be forthwith delivered to him their lawful proprietor, together with the boat *452] which they had piratically stolen from his plantation." To this memorial a written answer was sent. A correspondence also took place between the Spanish governor of East Florida and Sir G. Cockburn relative to the desertion of slaves from the Spanish settlements. This correspondence was previous to Mr. Forbes's letter or memorial, and after the memorial the plaintiff had an interview with the defendant, Sir G. Cockburn, and claimed of him the slaves in question, then on board the *Terror Bomb*, as his property. Sir G. Cockburn told him he might see his slaves, and use any arguments and persuasions he chose to induce them to return. The plaintiff accordingly endeavoured to persuade them to go back to his plantation, and no restraint was put upon them, but they refused to go. The plaintiff then urged his claim very strongly to Sir G. Cockburn, and said he must get redress if he did not succeed in prevailing upon Sir G. Cockburn to order them back again, which Sir G. Cockburn said he could not do, because they were free agents and might do as they pleased, and that he could not force them back. They were victualled and subsisted with Sir G. Cockburn's knowledge whilst on board the *Terror Bomb*, and on the 6th March were removed from that ship by Sir G. Cockburn's orders into his ship, the *Albion*. On the 9th March, 1815, Sir Alexander Inglis Cochrane addressed to Sir G. Cockburn the following letter. "Sir, Having received and considered your letter, No. 25, of the 28th February, 1815, and the correspondence it incloses respecting some individuals of colour, who have arrived at Cumberland island, and there placed themselves under the protection of his *453] majesty, and who have been since represented as having *escaped from his catholic majesty's possessions in East Florida, where it is said they were slaves, and in consequence have been formally demanded by the governor and other claimants of East Florida. I have the honour to inform you, that under the circumstances attending these people, I do not consider myself authorized (without reference to his majesty's government) to decide upon the claims set forth by the governor and other persons in East Florida, and, as without such reference, it will be impossible for me to attend to any solicitation of their being given up, you will be pleased to cause the refugees in question to be put on board one of his majesty's ships going to Bermuda, to be reported to me on their arrival there, and I will take care to have them so guarded as to prevent their desertion, and to be forthcoming, should it be decided that they are to be returned to East Florida." In the same month of March Sir G. Cockburn sailed in the *Albion* with the said slaves on board for Bermuda, at which time he had received intelligence of peace between this country and America; and such slaves as belonged to American subjects, and were in the possession of the defendants, were not taken away in consequence of the wording of the treaty of peace. Bermuda is a British colony, five hundred miles from East Florida, or any other land where slavery is acknowledged. The

slaves in question were, on the 29th March, 1815, transferred by Sir G. Cockburn's orders, from his majesty's ship *Albion* into his majesty's ship the *Ruby*, at Bermuda, and after being on board that ship about twelve months, were landed in that island, and many of them employed in the king's dock-yard there. The slaves which were taken on board the *Albion*, and belonging to the plaintiff, were worth to him 3800*l*.

**Comyn*, for the plaintiff. The plaintiff had a property in his slaves, and having been deprived of that property by the act of the defendant, [*454 is entitled to maintain this action. Although, by the 47 G. 3, c. 36, the traffic in slaves has been declared unlawful in a British subject, the courts of this country still have respect to the trade itself when carried on by the subjects of a state which continues to tolerate it. *Fortuna*, Dodson, 81; *Donna Marianna*, ib. 91. The trade is now considered *prima facie* illegal, and the burthen of proof that it is not so, is thrown upon those who carry it on. *Amedie*, ib. 84. If this be the law with respect to a trade which one branch of the legislature of this country (as appears by the preamble of the stat. 51 G. 3, c. 23) has pronounced to be contrary to the principles of justice and humanity, a fortiori it must prevail with respect to the rights of property in slaves in the subjects of a foreign country, especially when it is considered that slavery is recognised by the legislature in our own West India islands. It is true, that in this country slavery does not exist; but an action is maintainable for the price of slaves in the courts of this country. In *Butts v. Penny*, 2 Lev. 201, trover was brought for ten negroes. Upon special verdict it appeared by an examination of the record, that the action was brought to recover the value of negroes of which the plaintiff had been possessed in India. It is stated in the report that the court held, that negroes being usually bought and sold among merchants in India, and being infidels, there might be a property in them sufficient to maintain the action. It appears that no judgment was ever pronounced. The opinion of the court, however, is an authority to show, that the right of property in slaves, [*455 in a country where slavery is allowed, will be recognised by the laws of this country. In *Smith v. Gould*, 2 Ld. Raym. 1274, the action was brought for a negro wrongfully detained in a country where slavery was lawful. This distinction, also, was acted upon by the court in *Smith v. Brown and Cooper*, 2 Salk. 666, and it is recognised in *Sommersett's* case, State Trials, vol. 20. These authorities fully establish that this plaintiff had a property in these slaves while in Florida. They made their escape and got on board a British ship, of which one of the defendants, Sir G. Cockburn, was the commander. He had notice that they were the property of the plaintiff, and *Blake v. Lanyon*, 6 T. 221, is an authority to show that an action will lie for harbouring an apprentice, after notice that he is the apprentice of the plaintiff, and, by parity of reasoning, the present action is maintainable. The other defendant, Sir A. Cochrane, having concurred in the harbouring of these men, is also liable to be sued.

Jervis, contra. It may be conceded, that, by the laws of a particular country, one man may have a property in others as his slaves, and that an action may be maintained by him in the courts of this country for an injury done to that property while such his property in the slaves continued. Here, all rights of the plaintiff over those persons (who in Florida had been his slaves) ceased the moment when they got on board the British ship of war. In *Sommersett's* case it was decided, that a person who had been a slave in one of our own settlements, and came to this country, and was here detained by a captain of a ship for the purpose of taking him back to such settlement, was entitled to be set at liberty, inasmuch as the law of England did not recognise [*456 the state of slavery. Lord MANSFIELD says, "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law." It is incumbent on the plaintiff in this case, therefore, to show, that at the time when he demanded these slaves to be given

up to him, they were his slaves by the positive law of the place where they then were. Now it is clear, that the law of England prevailed on board the British ship. *Madrazzo v. Willes*, 3 B. & A. 353, is an authority upon that point, for in that case the Spanish law was recognised by our courts as prevailing on board the Spanish ship, and the slaves were, therefore, considered as property. By parity of reason, these persons who had been slaves ceased to be slaves the moment that they came on board the British ship, because, by the law of England, slavery is not allowed to exist. *Smith v. Brown and Cooper*, 2 Salk. 666, too, is an authority to show, that, in order to maintain an action for the price of a slave, it must be shown, on the face of the pleadings, that the parties were slaves by the law of the particular place where the sale took place. The right to property in slaves, therefore, is conferred by the municipal law of the place only, and can be enforced only for an injury to such property while the slave is within that place. If a British subject, resident in such a country, committed a violation of such a right, he might possibly be answerable for it in the courts of this country. The right, however, being created only by the municipal law, must be coextensive with it. If a master, therefore, brings his
 *457] slave to a place where slavery is unlawful, an action is not maintainable against another person for detaining or harbouring the slave, because there is no obligation on the latter to return to the service from which he has escaped.

BAYLEY, J. It is a matter of great satisfaction to me that this case, which is one of considerable importance, and of some novelty, may, at the option of either party, be turned into a special verdict. At present the impression upon my mind is, that the action is not maintainable. The cases decided in the admiralty courts are not applicable to the present. There certain persons had taken upon themselves to be active, and to seize ships having slaves on board, on the ground that they had a right so to do, either by the law of nations or the law of this country. The court of admiralty refused to assist the captors in condemning that property, to which the claimants, by the law of the particular country to which they belonged, had a right. In such cases the court of admiralty is called upon to act between the two countries upon a common principle applicable to both. That court, therefore, cannot lend its assistance in the condemnation of a vessel, on the ground that it is engaged in a traffic which, according to the municipal laws of the country to which the claimant belongs, is no wrong. The captain of the *Fortuna* had done no act that subjected him to condemnation by the laws of his own country, and this country had no right to say that he had been doing wrong, or that his property was subject to condemnation. In substance, therefore, the decision of that court operates only in the nature of an *amoveas manus* and no more. In *Madrazzo v. Willes*, the defendant had taken upon himself to be active, and to seize the ship and slaves, and
 458*] the court held that he had no right to make the seizure. Having thus disposed of the authorities referred to in argument, I now come to consider the question for our decision. My opinion in this case does not at all proceed upon the ground that slavery is not to be tolerated in the place where these slaves came on board; nor that an action, under circumstances, may not be maintained for enticing away or harbouring a slave: nor on the ground that the instant he leaves his master's plantation and gets upon other land, where slavery is not tolerated, that, *ex necessitate*, he becomes, to all intents and purposes, a free man. I give no opinion upon any one of these points; but I say that there is a great distinction between making the law of England active, and leaving the law of England passive. In the cases cited from the admiralty courts, the law of England was passive. Here we are called upon to put that law into activity upon the ground that the defendants had done a wrong. I am of opinion, however, that we are not warranted in coming to that conclusion, with reference to the character which the defendants at that time were filling. The

ground of complaint alleged in the first count of the declaration is, that the defendant enticed the slaves: there is no evidence to support that count. The second count charges, that the defendants harboured the slaves, knowing them to be the slaves of the plaintiff: and the third count, that they harboured them after notice. *Blake v. Lanyon*, 6 T. R. 221, is an authority to show that the latter is a good ground of action. It is unnecessary, therefore, to consider whether there was *evidence to show that the defendants knew the slaves to belong to the plaintiff. But a very material allegation in all the counts [*459] is, that the defendants wrongfully did the act with which they are charged; the question is, whether that allegation was made out against either of the defendants? In *Blake v. Lanyon* the defendant must have had full opportunity of making inquiry, and satisfying himself whether that which was asserted on the part of the plaintiff was true or not. There could be no difficulty in ascertaining, with respect to a person in this kingdom, whether he was the servant of A. B. or not; but a captain of an English man-of-war, engaged in foreign service, has not the same means of satisfying himself upon such a fact. It might have been wholly inconsistent with the duties which he had to perform, in his character of a servant of the public, either to leave his ship, in order to make such inquiry himself, or to dispatch persons in that public service to inquire whether these slaves belonged to the plaintiff or not. Supposing, during the absence of any of the persons detached on such duty, an occurrence had happened which required the exertions of the whole crew, it would have been no excuse to the government of this country for him to say, that he had detached some of his crew to ascertain whether certain persons who had come to his ship, and had been claimed as slaves by several persons residing in different places, in fact belonged to them. It might happen that every one of the slaves came from different places, and belonged to different owners, and it would have been necessary to make inquiries at each place. In this case the ship was within one mile of the shore, but it might have been fifty miles off. I am of opinion *that the defendants were bound to act bonâ fide. If it could be made out that they acted malâ fide, they would be liable to an action, but in [*460] order to support an action against a person who fills a public office like that which the defendants in this case filled, it is essential to show that they acted malâ fide. In this case the plaintiff claims the slaves as his own, and desires that they should be dismissed from the defendants' ship and put into his possession. Sir G. Cockburn said that they might go if the plaintiff could persuade them to go; but they refused to go. It is said that Sir G. Cockburn ought have sent them away from his ship, but to what place was he to send them? they would refuse to go to East Florida, and if he was bound to give them a boat, they would have the option of going where they thought fit, and probably would have gone to Cumberland Island; but the plaintiff desired to have them put in his possession, not to have them set at large. Sir G. Cockburn was called upon to consider a nice question of law, upon which legal men might entertain a difference of opinion, viz., whether a man who is a slave, in a country where slavery is tolerated, continues a slave when he goes out of the limits of that state, and whether neutrals are warranted in treating him as such. It appears to me, that Sir G. Cockburn acted bonâ fide. If he had said "these men shall not remain longer in my ship, but I will not put them into your possession; they shall go where they will;" it is clear that they would not have gone back into the plaintiff's service. Instead of that, however, Sir G. Cockburn writes to Sir A. Cochrane for instructions, and the latter considers it a question fit to be decided upon by the government, and directs that the slaves should be conveyed to a place *of security, where they might be forthcoming for the benefit of the plaintiff, if the government should decide [*461] that they should be restored to him. It appears to me, therefore, that the character of mala fides does not attach upon either of the defendants in this case,

and that being so, I am of opinion that they did not, in the language of this declaration, *wrongfully* harbour, detain, and keep the slaves. Their character, as public officers, placed them in a different situation from that in which other individuals would stand; and, upon that ground, I am of opinion, that the plaintiff is not entitled to maintain this action.

HOLROYD, J. I am also of opinion, that the plaintiff is not entitled to maintain the present action. The declaration alleges, that the plaintiff was the proprietor, and in the possession of a cotton plantation lying contiguous to the river St. John, in East Florida, on which land he employed divers persons, his slaves or servants. The plaintiff, therefore, claims a general property in them as his slaves or servants, and he claims this property, as founded, not upon any municipal law of the country where he resides, but upon a general right. This action is therefore founded upon an injury done to that general right. Now it appears, from the facts of the case, that the plaintiff had no right in these persons, except in their character of slaves, for they were not serving him under any contract; and, according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature. I do not mean to say that particular circumstances may not introduce a legal relation to that extent; but

*462] assuming that there may be such a relation, it can only have a *local existence, where it is tolerated by the particular law of the place, to which law all persons there resident are bound to submit. Now if the plaintiff cannot maintain this action under the general law of nature, independently of any positive institution, then his right of action can be founded only upon some right which he has acquired by the law of the country where he is domiciled. If he, being a British subject, could show that the defendant, also a British subject, had entered the country where he, the plaintiff, was domiciled, and had done any act amounting to a violation of that right to the possession of slaves which was allowed by the laws of that country, I am by no means prepared to say that an action might not be maintained against him. The laws of England will protect the rights of British subjects, and give a remedy for a grievance committed by one British subject upon another, in whatever country that may be done. That, however, is a very different case from the present. Here, the plaintiff, a British subject, was resident in a Spanish colony, and perhaps it may be inferred, from what is stated in the special case, that, by the law of that colony, slavery was tolerated. I am of opinion, that, according to the principles of the English law, the right to slaves, even in a country where such rights are recognised by law, must be considered as founded not upon the law of nature, but upon the particular law of that country. And, supposing that the law of England would give a remedy for the violation of such a right by one British subject to another, (both being resident in and bound to obey the laws of that country,) still the right to these slaves being founded upon the law of Spain, as applicable to the Floridas, must be coextensive with the territories of that state. I do not mean to

*463] say, that if the plaintiff having the right to possess these persons as his slaves there, had taken them into another place, where, by law, slavery also prevailed, his right would not have continued in such a place, the laws of both countries allowing a property in slaves. The law of slavery is, however, a law in invitum; and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country, without doing any wrongful act. This has been decided to be the law with respect to a person who has been a slave in any of our West India colonies, and comes to this country. The moment he puts his foot on the shores of this country, his slavery is at an end. Put the case of an uninhabited island discovered and colonized by the subjects of

this country; the inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail, until altered by the king in council; but in the case of the newly discovered country, freedom would be as much the inheritance of the inhabitants and their children, as if they were treading on the soil of England. Now, suppose a person who had been a slave in one of our own West India settlements, escaped to such a country, he would thereby become as much a freeman as if he had come into England. He ceases to be a slave in England, only because there is no law which sanctions his detention in slavery; for the same *reason, he would cease to be a slave the moment he landed in the supposed newly discovered island. In this case, indeed, the fugitives did [*464 not escape to any island belonging to England, but they went on board an English ship, (which for this purpose may be considered a floating island,) and in that ship they became subject to the English laws alone. They then stood in the same situation in this respect as if they had come to an island colonized by the English. It was not a wrongful act in the defendants to receive them, quite the contrary. The moment they got on board the English ship there was an end of any right which the plaintiff had by the Spanish laws acquired over them as slaves. They had got beyond the control of their master, and beyond the territory where the law recognising them as slaves prevailed. They were under the protection of another power. The defendants were not subject to the Spanish law, for they had never entered the Spanish territories, either as friends or enemies. The plaintiff was permitted to see the men, and to endeavour to persuade them to return; but in that he failed. He never applied to be permitted to use force; and it does not appear that he had the means of doing so. I think that Sir G. Cockburn was not bound to do more than he did; whether he was bound to do so much it is unnecessary for me to say. It was not a wrongful act in him, a British officer, to abstain from using force to compel the men to return to slavery. It does not appear that he prevented force being used. I do not say that he might not have refused, but in fact there was no refusal. I have given my opinion upon this question, supposing that there would be a right of action against these defendants, if a wrong had actually been done by them, but I am by no means *clear, that even under such [*465 circumstances, any action would have been maintainable against them by reason of their particular situation as officers acting in discharge of a public duty, in a place *flagrante bello*. I doubt whether the application ought not to have been in such a case to the governing powers of this country for redress. The cases from the admiralty courts are distinguishable from the present, upon the grounds already stated by my brother BAYLEY. In *Madrazzo v. Willes* the plaintiff was a Spanish subject, and by the law of Spain slavery and the trade in slaves being tolerated, he had a right, by the laws of his own country, to exercise that trade. The taking away the slaves was an active wrong done in aggression upon rights given by the Spanish law. That is very different from requiring, as in this case, an act to be done against the slaves, who had voluntarily left their master. When they got out of the territory where they became slaves to the plaintiff and out of his power and control, they were, by the general law of nature, made free, unless they were slaves by the particular law of the place where the defendant received them. They were not slaves by the law which prevailed on board the British ship of war. I am, therefore, of opinion, that the defendants are entitled to the judgment of the court.

BEST, J. The feelings which are naturally excited by a discussion of the subject of slavery may perhaps betray me into some warmth of expression; I beg, however, that nothing which I say may be considered as trenching upon the local rights of the proprietors of lands in our West India islands to the services of their slaves in that country. They have acquired those *rights under the encouragement of the legislature of this country, and they ought [*466

not to be put in jeopardy by any power in this country, unless a complete compensation be given to them by the public for the capital which they have been encouraged to embark in such property. The crime of slavery is the crime of the nation, and every individual in the nation should contribute to put an end to it as soon as possible. It is a relation which ought not to be continued one moment longer than is necessary to fit the slave for a state of freedom. For our convenience or our gain it ought not to be allowed to exist.

The plaintiff, in this case, states his rights in terms so general that possibly the declaration might have been bad upon demurrer, although it is sufficiently certain after verdict. It is incumbent upon us, however, to see what sort of servants the plaintiff claims. It is clear, from the case, that they were not servants in our sense of the word; that they were not servants by contract, but slaves. The first objection that occurs to me in this case is, that it does not appear upon the special case, that the right to slaves exists in East Florida. That right is not a general but a local right; it ought, therefore, to have been shown that it existed in Florida, and that the defendants knew of its existence. Assuming, however, that those facts did appear, still, under the circumstances of this case, this action could not be maintained. These slaves were not seduced from the service of their employer by any act of the defendants; if they had, the case would have been different. The plaintiff, therefore, can only be entitled to recover upon the count which charges the defendants with harbouring the slaves.

*Then the question is, were these persons slaves at the time when Sir G.
 *467] Cockburn refused to do the act which he was desired to do? I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a British man-of-war, not lying within the waters of East Florida, (where, undoubtedly, the laws of that country would prevail,) those persons who before had been slaves, were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognised by the local law, they have broken their chains, they have escaped from their prison, and are free. These men, when on board an English ship, had all the rights belonging to Englishmen, and were subject to all their liabilities. If they had committed any offence they must have been tried according to English laws. If any injury had been done to them they would have had a remedy by applying to the laws of this country for redress. I think that Sir G. Cockburn did all that he lawfully could do to assist the plaintiff; he permitted him to endeavour to persuade the slaves to return; but he refused to apply force. I think that he might have gone further, and have said that force should not be used by others; for if any force had been used by the master or any person in his assistance, can it be doubted that the slaves might have brought an action of trespass against the persons using that force? Nay, if the slave,
 *468] acting upon his newly recovered right of *freedom, had determined to vindicate that right, originally the gift of nature, and had resisted the force, and his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, according to our laws, be guilty of murder? That is substantially decided by *Sommersett's* case, from which, it is clear, that such would have been the consequence had these slaves been in England; and so far as this question is concerned, there is no difference between an English ship and the soil of England; for are not those on board an English ship as much protected and governed by the English laws as if they stood upon English land? If there be no difference in this re-

spect, *Sommersett's* case has decided the present: he was held to be entitled to his discharge, and, consequently, all persons attempting to force him back into slavery would have been trespassers, and if death had ensued in using that force, would have been guilty of murder. It has been said, that Sir G. Cockburn might have sent them back. He certainly was not bound to receive them into his own ship in the first instance, but having done so, he could no more have forced them back into slavery than he could have committed them to the deep. There may possibly be a distinction between the situation of these persons and that of slaves coming from our own islands, for we have unfortunately recognised the existence of slavery there, although we have never recognised it in our own country. The plaintiff does not found his action upon any violation of the English laws, but he relies upon the comity of nations. I am of opinion, however, that he cannot maintain any action in this country by the comity of nations. Although the English law has recognised *slavery, it has done so within certain limits only; and I deny that in any case an action has been held to be maintainable in the municipal courts of this country, founded upon a right arising out of slavery. Let us look to the history of the odious traffic out of which the relation of master and slave in the West Indies has arisen. Queen Elizabeth expressed her hope to Sir John Hawkins that the negroes went voluntarily from Africa to submit to domestic slavery in another country, and declared, that if any force was used to enslave them, she doubted not it would bring down the vengeance of heaven upon those who were guilty of such wickedness. It is unfortunate, however, for the memory of that queen, that in her reign patents were granted to encourage the trade, and those were followed up by acts of parliament expressly recognising it. The legislature interfering from motives of humanity, regulated the mode of transporting slaves, and also the making of insurances upon them. An act was also passed soon after we had accomplished our own liberty, viz., the 9 & 10 W. 3, c. 26, s. 7, 8, 9, which certainly speaks of these unhappy beings by the degrading appellation of merchandise, and of their being brought to England, not as the termination of the voyage, but as a place at which ships might call. I think, however, that notwithstanding that act, if they had come here and got within the waters of England, they might have been discharged by means of writs habeas corpus. There was also a statute passed in the reign of G. 2, 5 G. 2, c. 7, s. 4, by which slaves in the West India islands, like other property, were made saleable, and subject to the debts of the persons to whom they belong. Both those statutes, however, were local in their application, being *confined to the West India islands only. I do not, therefore, feel myself fettered by any thing expressed in either of them, in pronouncing the same opinion upon the rights growing out of slavery, as if they had never passed. If, indeed, there had been any express law, commanding us to recognise those rights, we might then have been called upon to consider the propriety of that which has been said by the great commentator upon the laws of this country, "that if any human law should allow or enjoin us to commit an offence against the divine law, we are bound to transgress that human law." Bl. Com. vol. i. p. 42.

There is no statute recognising slavery which operates in the part of the British empire in which we are now called upon to administer justice. It is a relation which has always in British courts been held inconsistent with the constitution of the country. It is matter of pride to me to recollect that, whilst economists and politicians were recommending to the legislature the protection of this traffic, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the

subject-matter of property. As a lawyer I speak of that early determination, when a different doctrine was prevailing in the senate, with a considerable degree of professional pride.

I say there is not any decided case in which the power to maintain an action arising out of the relation of *master and slave has been recognised in this country. I am aware of the case in *Levinz*, but there the question was never decided, and if it had, in the case of *Smith v. Gould*, the whole court declared that the opinion there expressed is not law. And the same had before been said by Lord Holt in the case of *Chamberlain v. Harvey*, 1 Ld. Raym. 146. The case of *Smith v. Brown and Cooper* has been misunderstood. It has been supposed to establish the position, that an action may be maintained here for the price of a negro, provided the sale took place in a country where negroes were saleable by law. But that point was not decided. The court only held, that the question could not be agitated unless that fact was averred on the face of the declaration. In this case the slaves belonged to the subject of a foreign state. The plaintiff, therefore, must recover here upon what is called the *comitas inter communitates*; but it is a maxim, that that cannot prevail in any case where it violates the law of our own country, the law of nature, or the law of God. The proceedings in our courts are founded upon the law of England, and that law is again founded upon the law of nature and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognise it. I take it, that that principle is acknowledged by the laws of all Europe. It appears to have been recognised by the French courts in the celebrated case alluded to by Mr. *Hargrave* in his argument in *Sommersett's* case. Mr. Justice BLACKSTONE, in his *Commentaries*, vol. i. p. 42, says, "upon the law of nature and the law of revelation, depend all human laws; that is to say, no human law should be suffered to contradict *these." Now if it can be shown that slavery is against the law of nature and the law of God, it cannot be recognised in our courts. In vol. i. p. 424, the same writer says, "the law of England abhors, and will not endure the existence of slavery within this nation;" and he afterwards says, that "a slave or negro, the instant he lands in England, becomes a freeman, that is, the law will protect him in the enjoyment of his person and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before;" and then, after some other observations which it is unnecessary to notice, he says, "whatever service the heathen negro owed of right to his master, by general, not by *local* law, the same (whatever it be) is he bound to render when brought to England and made a Christian." Whatever service he owed by the local law, is got rid of the moment he got out of the local limits. Now what service can we owe by the general law? Service to our country, service to our relations for the protection they have afforded us, and service by compact. A state of slavery excludes all possibility of a right to service arising by either of these means. A slave has no country, he is not reared by or for his parents, or for his own benefit, but for that of his master, he is incapable of compact. We have the authority of the civil law for saying that slavery is against the rights of nature, Inst. Lib. 1, tit. 3, s. 2. The legislature of this country has given judgment upon the question. They have abolished the trade in slaves, they have even bought up at a great price the right of other countries to carry it on. We might, perhaps, have called upon them to abandon the traffic without remuneration. It might have been glorious thus to *pdt down an usurpation against the rights of nature, but we had participated too largely in the iniquitous traffic to be justified in throwing the first stone, and may be considered as having paid this sum as a sin-offering for our transgressions. In *Sommersett's* case, 20 Howell's St. T. 79, Lord MANSFIELD observes, "The difficulty of adopting the relation without

adopting it in all its consequences, is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate." Somerset was discharged. He might then have maintained an action against those who had detained him; and if that be so, how can any action be maintained against these defendants for not assisting in the detention of these men? The place where the transaction took place was, with respect to this question, the same as the soil of England. Had the defendants detained these men on board their ships near the coast of England, a writ of habeas corpus would have set them at liberty. How then can an action be maintained against these gallant officers for doing that of their own accord which, by process of law in a British court of justice, they might have been compelled to do? I have before adverted to the narrower ground upon which this case might have been decided, but if slavery be recognised by any law prevailing in East Florida, the operation of that law is local. It is an antichristian law, and one which violates the rights of nature, and therefore ought not to be recognised here. For these reasons I am of opinion, that our judgment must be for the defendants.

Judgment for the defendants.

*BATES v. CORT.

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Declaration stated, that by agreement between plaintiff and G. G., plaintiff agreed to sell and deliver to G. G. a lace machine for 220*l.*; to be paid thus, 40*l.* on delivery, and the residue by weekly payments of 1*l.*, which were to be paid to defendant, as trustee for the plaintiff, and in case of any default, plaintiff was to have back the machine; and in consideration of the premises, and of plaintiff, at the request of the defendant, appointing him to receive the weekly instalments, defendant promised the plaintiff to take the machine and pay the balance, should there be any default by G. G. in the weekly payments: *Held*, that this promise was nudum pactum, and void.

ASSUMPSIT on a special agreement. The first count of the declaration stated, that by a certain memorandum of agreement made between plaintiff and one G. G., the plaintiff agreed to sell and deliver to G. G. a lace machine, then in a working condition, for 220*l.*, to be paid for as follows: 40*l.* to be paid on delivery, and 1*l.* per week thereafter until the full amount was discharged, with lawful interest; and it was thereby mutually agreed that the 1*l.* per week should be paid to the defendant, who was authorized to receive the same for the plaintiff as his trustee. And in case of default of G. G. paying the defendant 1*l.* per week, he should forfeit the whole money which might be then paid, and the machine should be returned to the plaintiff. And thereupon afterwards, to wit, on, &c., in consideration of the premises, and of the plaintiff, at the request of the defendant, appointing him to receive the said sum of 1*l.* per week for the machine from G. G., the defendant undertook, and promised the plaintiff, to take the machine and pay the balance, should there be any default by G. G. in the weekly payments to the plaintiff. The declaration then averred delivery of the machine to G. G. at the price of 220*l.*, payment of 40*l.* at the time; but default in the subsequent weekly payments, and that on, &c., 61*l.* became and still was due for such payments. The plaintiff, on, &c., appointed defendant to receive the weekly payments, and was always thenceforth willing to suffer him to receive them; *yet defendant, although requested, would not pay plaintiff the said arrears of 61*l.*, or any part. The second count, in like manner, set out the agreement, the promise of defendant, part performance, and subsequent default by G. G.; and then proceeded, "although the plaintiff did, on, &c., appoint defendant to receive the weekly payments, and hath always been willing to suffer him to receive them, and to take the said machine to and for his own use and benefit, of which defendant had notice, yet defendant would not pay the balance due from G. G. to the plaintiff." Pleas, first, general issue: secondly, that the promise in the first count was to answer for the de-

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fault of another, and that the only consideration for it, was the appointment of the defendant to receive the weekly payments, and that there was no agreement or memorandum thereof in writing signed by defendant, or any person duly authorized, wherein any other consideration was stated. Thirdly, a similar plea to the second count. The replication, after protesting that the promise of defendant, laid in the first count, was not for the default of another, and that the appointment of defendant was not the only consideration, set out an agreement in writing between the parties. Similar replication to the third plea. General demurrer and joinder.

Chitty, in support of the demurrer. The pleas seem to have been drawn with a view to found an objection on the seventeenth section of the statute of frauds; but the declaration is bad at common law, the promise as laid being void for want of consideration. *Forth v. Stanton*, 1 Wms. Saund. 210, and n. 2. [476] The appointment of the defendant to receive *the weekly instalments is the only consideration alleged, but he was bound to pay the money over as soon as he received it; indeed the plaintiff might have sued him for it, without even making a previous demand. In *Baker v. Jacob*, 1 Bulstr. 41, it was held that an agreement "to forbear for a little while" was not a sufficient consideration; and *Elsie v. Gatward*, 5 T. R. 143, shows that a count merely setting out the non-performance of a promise, is not sufficient; it must also show a consideration for the promise. (He was then stopped by the court.)

Manning, contra. The question certainly turns on the form of the declaration, not upon the subsequent pleadings; for if that be good, the pleas are clearly bad. The first count, perhaps, cannot be supported, but the second may; for however informally the facts may be stated on the record, yet, if upon the whole there appears to have been an undertaking by the plaintiff to let the defendant take the machine, that is a sufficient consideration for his promise. Now, upon such an agreement as that stated, an action would lie against the plaintiff for not suffering the defendant to take the machine.

Per Curiam. The declaration affects to show the legal operation of the agreement. Now that states that the agreement bound the defendant to take the machine, not the plaintiff to deliver it. The declaration does not even show that it was in the plaintiff's power to deliver the machine; for it is not stated that he had ever got it back from the original vendee. There certainly is an allegation of willingness to let the defendant take the *machine, but that [477] does not appear to have been in pursuance of any pre-existing agreement, nor does the whole import any obligation on the plaintiff to let the defendant take it. The declaration is therefore bad, no sufficient consideration for the defendant's promise being shown.

Judgment for the defendant.

THOMAS and Another, Assignees of R. HOBSON, a Bankrupt, v.
HEATHORN.

Declaration in assumpsit by the assignees of a bankrupt stated that the defendant was indebted to the bankrupt before his bankruptcy in 1000*l.* for goods sold, &c., and concluded by stating that the plaintiff had sustained damage to that extent. Plea, that before the bankruptcy upon an account stated between the bankrupt and the defendant, the latter was found to be indebted to the bankrupt in the sum of 400*l.*, for which said sum the bankrupt drew a bill upon the defendant, which the defendant accepted for and on account of the said several promises in the declaration mentioned, by reason whereof the defendant became liable to pay the bill. The plaintiff having replied over, it was held, upon demurrer to the replication, that the plea was bad, inasmuch as it was pleaded to the whole of the demand; and the giving of a bill for 400*l.* was not, in point of law, a satisfaction of 1000*l.*, the amount of the debt claimed.

Assumpsit by the plaintiffs, as assignees of Hobson, a bankrupt. The first count of the declaration stated, that the defendant was indebted to the bankrupt before his bankruptcy, in the sum of 1000*l.* for goods sold, &c., and the pro

mise was alleged to be made to the bankrupt before his bankruptcy. There were seven other counts, in each of which the sum mentioned as due was 1000*l.*, and in all these counts the promises were laid to have been made to the bankrupt before his bankruptcy. There was also another set of counts laying the promises to have been made to the assignees since the bankruptcy. The defendant pleaded, first, non-assumpsit to the whole declaration; and secondly, as to the first eight counts, that after the making of the promises in those counts mentioned, and before Hobson became a bankrupt, and before the commencement of the suit, to wit, on, &c., at, &c., an account was had and stated *between Hobson and the defendant, of and concerning the sums of money in those counts mentioned; and upon such accounting, the defendant [478 was found to be indebted to Hobson in the sum of 400*l.*, for which said sum of 400*l.*, Hobson, according to the usage and custom of merchants, made his bill of exchange, and directed the same to the defendant, and thereby required the defendant, three months after the date thereof, to pay to Hobson or his order the sum of 400*l.* for value received, and delivered the bill to the defendant, who thereupon accepted the same for and on account of the said several promises and undertakings in the said counts mentioned; and by reason thereof, the defendant became and from thence continually, until Hobson became a bankrupt, was liable to pay to Hobson or his order, and since the bankruptcy to the order of Hobson or the plaintiffs as his assignees, the money in the bill specified. Replication to the first plea joining issue; and to the second, that before Hobson became a bankrupt, to wit, on, &c., at, &c., when the bill was due and payable, it was duly presented to the defendant for payment, who was requested to pay the same, but that he did not pay the same either to the bankrupt or his assignees. To this replication there was a demurrer, and the causes of demurrer assigned were, first, that the bill mentioned in the second plea was a negotiable instrument, and for any thing that appeared in the said replication it might have been negotiated by Hobson before he became bankrupt, or his assignees since his bankruptcy, and that the defendant might be liable to be sued upon it by some other person as the holder; and, secondly, that it did not appear that the bill was *then unpaid in the possession, or under the control of the [479 plaintiffs.

Campbell, in support of the demurrer. The case of *Kearslake v. Morgan*, 5 T. R. 513, is an authority to show that this plea is good. [BAYLEY, J. There is this difference between the two cases. Here, this plea is pleaded to the whole demand contained in the first eight counts. There only to parcels of the demand.] This plea would be good upon general demurrer, and the plaintiffs having replied over, no other objection can be taken to the plea, except such as might be taken upon general demurrer. Now, the fair intendment of the plea is, that upon taking the account the defendant was indebted in no more than 400*l.*, and that that was the balance then due. The plea is certain to a common intent, which is sufficient upon general demurrer. [BAYLEY, J. Then you must contend, that if issue had been taken upon the fact, whether more than 400*l.* was due, it would have been an answer to the whole plea.] It is also averred, that the bill was accepted for and on account of the promises in the declaration; and in *Richardson v. Rickman*, B. R. M. 16 G. 3, (a) the plea appears to have been pleaded to the whole demand. [HOLROYD, J. That does not sufficiently appear, nor was the objection ever taken.] Supposing the plea to be good on the face of it, this replication is insufficient, because it does not show that the bill was still in the hands of the assignees. That fact being in the knowledge of the plaintiffs or the bankrupt, ought to have been averred by them. It does not *appear that the bill had not been negotiated, it may [480 be inferred that it has, and that the defendant may be called upon to pay the debt a second time. The replication does not state by whom the bill was

presented, nor that the bankrupt or his assignees ever required the defendant to pay it.

Holt, contra, was stopped by the court.

BARLEY, J. I am of opinion that this plea is bad. It is perfectly clear, that a plea which professes to be an answer to the whole declaration, but which, in fact, is an answer to part only, is bad. Now, this plea professes to be an answer to the whole of the first eight counts of the declaration. What is the charge contained in those counts? Each count charges the defendant with a debt of 1000*l.*, and states that the plaintiffs have sustained damages to that amount. If they could have proved that they were damnified to that extent, they would have been entitled to recover the full amount. In answer to that demand, the defendant pleads that an account was stated between the bankrupt and himself, and that he, the defendant, was found to be indebted to the bankrupt in 400*l.*, for which *said* sum of 400*l.* the bankrupt drew his bill, which the defendant accepted. The plea does not allege that no more 400*l.* was due, but only that that was the finding when the account was taken. It is argued that that defect is supplied by the allegation, that the bill of exchange was accepted by the defendant *for and on account of the said several promises and undertakings in the declaration mentioned*; or in other words, that the acceptance *481] for 400*l.* for and on account of the debt of *1000*l.*, is a good discharge in law of the latter debt. But it is perfectly clear, that in point of law the payment of a smaller sum cannot be pleaded as a satisfaction for a larger. That being so, I am of opinion, that inasmuch as this plea is pleaded as an answer to the whole demand contained in the first eight counts of the declaration, it is bad, and that the plaintiffs are entitled to the judgment of the court.

HOLROYD, J. I am of the same opinion. The correct way of pleading in this case would have been to say, as to all the sums of money except 400*l.* non-assumpsit, and then as to that sum, that the bill was given as stated in the second plea. Here the plea is, that the defendant upon accounting was found to be indebted in 400*l.*, and that the bill of exchange was given for that 400*l.* Now it is consistent with that allegation, that much more may have been due. The defendant may have been found to be indebted in 400*l.*, but it might not have been possible to ascertain at that time whether more was due or not. In the case of a plea of tender, the tender of the larger sum is a good answer to a demand for a smaller, on the principle *omne majus in se continet minus*; so a set-off of a smaller sum is sufficient, because a part only may be set off. Here, the acceptance of the 400*l.* for and on account of the several promises and undertakings mentioned in the declaration extinguishes the debt claimed only to that amount. Generally speaking, the mere acceptance of a less sum is not in law any satisfaction of a greater sum. An agreement between a debtor and creditor, *482] that part of a larger sum due should be paid by the debtor and accepted by the creditor as a satisfaction for the whole, might, under special circumstances, operate as a discharge of the whole debt. But then the legal effect of such an agreement might be considered to be the same as if the whole debt had been paid, and part had been returned, as a gift to the party paying. Here, the plea is merely that the bill of exchange for 400*l.* was accepted in discharge of a debt of 1000*l.*, but that clearly is a bad plea, because the mere acceptance of 400*l.* does not necessarily operate in point of law as an extinguishment of the debt of 1000*l.* I am therefore of opinion, that the judgment of the court must be for the plaintiffs.

Barr, J., concurred.

Judgment for the plaintiffs.

See Mr. Stephen's *Treatise on the Principles of Pleading*, p. 233.

*BRITTEN and WILSON v. WILLIAM WEBB.

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Declaration upon a bill of exchange drawn by the plaintiffs upon one F. W., endorsed by the plaintiffs to defendant, and re-endorsed by him to the plaintiffs. Averment, that at the time of the drawing of the said bill, and of the endorsement by the defendant to the plaintiffs, it had been agreed between them that the name of the defendant should be endorsed upon the bill as a security to the plaintiffs for the due payment thereof by F. W., and that the bill was so endorsed by the defendant under such agreement, and for such purpose only, and that the plaintiffs took and received the bill in satisfaction of such debt of the said F. W., upon the faith that the defendant would endorse the same as such security, and that the endorsement by plaintiffs was made without any consideration, and for the purpose only of procuring the endorsement of the defendant, and making the bill negotiable. Averment, that the bill was presented to F. W., and that he refused to pay, and that notice of such refusal was given to the defendant, and he thereby became liable to pay, and being liable, promised: *Held*, upon demurrer, that this declaration was bad, inasmuch as, if the action was founded upon the bill, the plaintiff could only recover according to the custom of merchants, and by that custom the plaintiffs, as endorers and drawers, would be liable to pay the amount of the bill to the defendant; and if the action was considered as founded upon the special contract, it was not maintainable, inasmuch as there was not any consideration for the defendant's endorsement.

THE first count of the declaration was upon a bill of exchange for 500*l.* drawn by the plaintiffs upon one Francis Webb, payable six months after date to their order, and accepted by him, which said bill was endorsed by the plaintiffs to William Webb, and re-endorsed by him to the plaintiffs. The declaration then averred, that at the time of the drawing of the said bill of exchange by the plaintiffs, and of the endorsement thereof by the defendant to the plaintiffs, it had been agreed by and between the plaintiffs and defendant, that the name of the defendant should be endorsed upon the said bill of exchange as a security to the plaintiff for the due payment of the said sum in the said bill of exchange mentioned, by the said Francis Webb to them, the plaintiffs; and that the said bill of exchange was so endorsed by the defendant under such agreement, and for such purpose only, to wit, on, &c., at, &c.; and that they, the plaintiffs, took and received such bill in satisfaction of such debt of the said Francis Webb, upon the faith and confidence that the said defendant would so endorse *the same as such security as aforesaid; and that the endorsement so as [484] aforesaid made by them the plaintiffs to the defendant, was made without any consideration received by them from the defendant, and for the purpose only of procuring the endorsement of the defendant and making the said bill of exchange negotiable, to wit, &c. The declaration then averred presentment to F. Webb, and refusal by him to pay and notice to the defendant of such refusal; and that the defendant by reason of the custom of merchants became liable to pay, and being liable, promised, &c. Breach, non-payment. To this count the defendant demurred.

Tindal, in support of the declaration, was called upon by the court. It must be admitted, that, according to *Bishop v. Hayward*, 4 T. R. 470, the plaintiffs could not, as endorsees of the bill, maintain an action against the defendant founded merely on the custom of merchants. Because, the defendant, in the same character of endorsee, would be entitled to recover back again from the plaintiffs the identical sum which the latter claim in this action. But in that case it was admitted, that there might be circumstances which, if disclosed on the record, would entitle the plaintiff to recover on the note. Now in this case such circumstances are disclosed. For it is averred, that the defendant endorsed the bill as a surety for Francis Webb, who was indebted to the plaintiffs; and that the bill was taken by them as a satisfaction of such debt. Here, therefore, it appears that the plaintiffs have a real demand against the defendant, which gets rid of the objection mentioned by *BULLER, J.*, in *Bishop v. Hayward*.

*ABBOTT, C. J. I am of opinion that judgment must be given for the defendant. If this declaration be considered as founded upon the bill of exchange, the right of the plaintiffs to recover must depend upon the usage and [485]

custom of merchants. Now, according to that custom, the plaintiffs as endorsers and drawers would be liable to pay the bill to the defendant the endorsee, whereas the plaintiffs claim to receive the amount from the defendant. If on the other hand the action be founded upon the special contract, then they cannot recover, because it does not appear that there was any consideration for the defendant's endorsement. The plaintiffs could not have maintained any action against the defendant for not endorsing the bill according to his promise.

BAYLEY, J. I am of the same opinion. This count is contradictory; it alleges, in the first instance, that the plaintiffs by their endorsement appointed the money to be paid to the defendant, and then that they did not appoint the money to be paid to the defendant, for that the endorsement was ineffectual. As to the special agreement, there was no consideration for it. Besides, the plaintiffs are not at liberty to set up a parol contract inconsistent with a written contract, and that would be the effect of enabling them to recover on this declaration against the defendant. For it appears by the bill of exchange, which was in writing, that the defendant was entitled to have the contents of the bill paid to him, whereas the effect of the agreement attempted to be set up, is to show that it never was intended to be paid to him, but that he should be a surety for the payment of it to the plaintiffs.

*486] HOLROYD, J. In support of the first count of this declaration, it is necessary to make out that the action is maintainable either upon the special agreement stated in that count, or upon the bill of exchange according to the custom of merchants. Now the action is not maintainable upon the bill of exchange according to the decision of *Bishop v. Hayward*, because that would produce a circuity of action. That being so, then the action (if maintainable at all) must be founded upon the special agreement; but in order to make that agreement binding, some consideration ought to be shown. The declaration states that it was agreed between the plaintiffs and the defendant, that the name of the defendant should be endorsed upon the bill as a security for the payment of the money by Francis Webb, the latter being indebted to the plaintiffs. It does not appear, therefore, that there was any consideration moving from the plaintiffs to the defendant to induce him to endorse the bill. That being so, the agreement was void, and the judgment must be for the defendant.

Judgment for defendant.

MILLMAN v. PRATT.

Where, in case for slander of title, it appeared by the declaration that the plaintiff had a certain interest in the premises, and that by an agreement between himself and the defendant, (from whom he derived that interest,) he had a clear right to dispose of the whole of that interest, but only a doubtful right to dispose of any portion of it; and the plaintiff averred that he put up *his said interest* to auction, and that defendant published a libel of and concerning his right to sell the *said interest*; the evidence being, that he offered for sale a portion of that interest only: *Held*, that this was a fatal variance.

CASE for slander of title. The declaration stated, that before the time of committing the grievances complained of, M. W. and H. L. were lawfully possessed *487] of certain premises for the residue of a certain term of "ninety-nine years, commencing March 25th, 1791, which premises had been assigned by defendant to them in trust to sell the same; and that thereupon, and before, &c., the said premises were conveyed by indenture by the said M. W. and H. L. and defendant, to the plaintiff, for the residue of the said term. And by a certain agreement made, at the same time as the last-mentioned indenture, between plaintiff and defendant, it was agreed that defendant at certain times, and upon certain terms, (particularly set out in the declaration,) should be at liberty to repurchase the premises. "Provided also, and it was by the said agreement expressly agreed and declared between the parties thereto, that in case the plaintiff should at any time thereafter be under the necessity of selling the premises

he should be at liberty so to do, upon giving the defendant six months' notice in writing, of his intention, unless the defendant should, in the meantime, pay him the sum of 1600*l.* for the purchase of the premises." The plaintiff then averred, that he was under the necessity of selling, and gave defendant six months' notice of his intention, who did not, in the meantime, pay 1600*l.*, or any part thereof. The declaration then set out certain proceedings in chancery, whereby it appeared, that the defendant had obtained an injunction to restrain the plaintiff from selling, which was afterwards dissolved; and then proceeded, "By reason of all which premises, the plaintiff before the time of committing, &c., had good and sufficient right, title, power, and authority to sell and dispose of the said premises; and having such good right, &c., afterwards, to wit, on, &c., caused the *said interest* of him, the plaintiff, of and in the premises, to wit, all the residue and remainder of the said term of ninety-nine years then to come and unexpired therein, to be, and *the same then and there was put up and exposed to sale by public auction. Yet defendant knowing [*488 the premises, and that the right of plaintiff to sell the said interest in the said premises had become and was absolute, and that he had good right to sell the same, but intending to injure the plaintiff, to slander his title to the said premises, to prevent persons from bidding for and purchasing the said interest of the plaintiff in the said premises, and to hinder and prevent the plaintiff from disposing of the same, afterwards, and just before, and upon the exposure to sale of the said interest of the said plaintiff in the said premises, to wit, &c., falsely, &c., published a libel of and concerning the title of the plaintiff to the said premises, and of and concerning his right to sell *his said interest* therein, in the form of a notice, (the declaration then set out the libel with innuendoes.) By means of the publication of which libel, persons desirous of purchasing were hindered and prevented from bidding for *the said interest* of the plaintiff in the said premises." At the trial before ABBOTT, C. J., at the Westminster sittings, after last Trinity term, it appeared in evidence that the interest which the plaintiff had put up to auction was not the residue of the term of ninety-nine years as alleged in the declaration, but a proposed lease of twenty-two years. The lord chief justice thought this a fatal variance, and nonsuited the plaintiff. In Michaelmas term a rule was obtained to set aside the nonsuit; and now,

Scarlett and Carter were called upon to support the rule. The question is, whether the plaintiff was bound to prove the interest which he proposed to sell, exactly as laid. That was not the gist of the action, but only an ingredient whereby the jury were to estimate the *damages. It was sufficient to show a right to dispose of the premises, and an attempt to do so, then the defendant committed an injury by saying that the plaintiff had no right to sell. [HOLROYD, J. The declaration has this allegation, "Whereby the plaintiff was prevented from selling *the interest aforesaid*;" that refers to the whole interest which he had, and he never intended to sell that.] The allegation implies that the plaintiff was prevented from selling any part of his interest, and proof of being prevented from selling any part sustained the action; for this being in tort, it was not necessary to prove the quantity of that interest as laid, *Ricketts v. Salway*, 2 B. & A. 360.

ABBOTT, C. J. This appeared upon the face of the record to be an action against a party who was interested in the premises, and not a mere wrong-doer. The declaration disclosed a clear right in the plaintiff to sell the whole interest in the premises, if necessary, but a doubtful right to sell any partial interest. I thought at the trial, and still continue of the same opinion, that the defendant ought to have had an opportunity of putting that question on the record. But he would have been deprived of that right had it been held that the declaration in its present form was satisfied by the evidence given. I think, therefore, that the nonsuit ought not to be set aside.

BAYLEY, J., concurred.

HOLROYD, J. The declaration alleges the libel to be of and concerning the plaintiff's right to sell *the said interest*. Is the grant of an underlease the sale of any thing? The sale of a thing existing is very different from an agreement for money to create a thing de novo. Now, although the whole cause of action laid need not be proved, still the proof must be of the same ground of action pro tanto.

BEST, J., concurred.

Rule discharged.

Marryat and Bayley were to have opposed the rule.

DOE dem. HARRIS v. MASTERS.

Where a lease contained a proviso that, if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made:" *Held*, that the rent having been in arrear for the time specified, an ejectment might be maintained without actual re-entry, and without any demand of the rent.
After trial, the court will not relieve the tenant by staying proceedings in the ejectment upon payment of the arrears of rent and costs.

EJECTMENT to recover possession, for non-payment of rent, of a certain chapel called Spring Garden Chapel, situate in Spring Gardens, in the parish of Saint Martin in the Fields, in the county of Middlesex. At the trial before ABBOTT, C. J., a verdict was found for the plaintiff, subject to the opinion of the court upon the following case. The lessor of the plaintiff, James Harris, by a certain indenture of lease dated the 7th day of March, 1821, and made between the said James Harris of the one part, and the said George Masters of the other part, demised unto the said defendant the said chapel, called Spring Garden Chapel for the term of seven years wanting fourteen days, from the 25th day of March then instant, at the yearly rent of 250*l.* payable half-yearly, on the 29th day of September *and the 25th day of March, without deduction, except as
*491] thereinafter mentioned; the first half-yearly payment to be made on the 29th day of September then next ensuing; and the said defendant did, amongst other things, covenant with the said James Harris, that he would pay the reserved rent on the days and times appointed by the lease for the payment thereof. The lease contained also the following proviso, "Provided always, and it is hereby declared and agreed by and between the said parties hereto, and these presents are upon this express condition, nevertheless, that in case the said rent shall be behind or unpaid for the space of twenty-one days next after the respective days, whereon the same respectively are hereinbefore appointed to be paid as aforesaid, although and notwithstanding no formal or legal demand shall be made for payment thereof; that then and in such case, it shall and may be lawful for the said James Harris, into and upon the said hereby demised premises, or any part thereof, in the name of the whole wholly to re-enter." On the 25th day of March, 1822, the second half-year's rent became due, which not having been paid, or offered to be paid, Mr. Harris brought this ejectment, laying the demise therein on the 26th day of April last. No demand was made on the part of the said James Harris of the rent, nor was any formal re-entry made for breach of the covenant, and there was sufficient distress on the premises to countervail the arrears of rent.

Abraham, for the plaintiff. This case is not to be decided by the common law, or by the 4 G. 2, c. 28, but by the special provision in the lease, that the lessor should be *at liberty to re-enter for non-payment of rent, although
*492] no formal or legal demand should have been made. In *Dormer's* case, 5 Co. 40, it is said, that "by special consent of the parties re-entry may be for default of payment of rent without demand of it." So in *Goodright v. Cator*, 2 Doug. 477, a proviso for re-entry for non-payment of rent, "although no de-

mand thereof should be lawfully made," was held to dispense with any demand at all.

Curwood, contra. It is stated in the case that no demand of the rent was made, and that there was a sufficient distress on the premises. Now the court will construe the lease strictly, as this action is brought to take advantage of a forfeiture. At common law great niceties were to be observed in making a demand of rent, and the stipulation in the lease, "that no legal or formal demand should be necessary," was intended to relieve the lessor from those niceties, but not from the necessity of making any demand. Then there was no re-entry: it will be said that bringing the action was sufficient, but the contract must be construed strictly, and that only gives a right of re-entry.

Per Curiam. It has been decided in many cases that an actual entry need not be proved in such a case as this. As to the other point, *Dormer's* case and *Goodright v. Cator* are decisive. By the covenant in this lease, the defendant has dispensed with all such demand as the law would otherwise have required.

Postea to the plaintiff.

*In Hilary term and before execution, a rule nisi was obtained for staying all proceedings in the ejectment, upon the defendant's bringing into court the arrears of rent claimed, and 100*l.* to answer the costs, in order that the master might compute what was due for rent and costs, and that such sum should be paid to the lessor of the plaintiff; against which,

Abraham showed cause, and relied upon *Roe dem. West v. Davis*, 7 East, 363, as showing that the application being after a trial, was too late.

Curwood, contra, contended that this was not a proceeding under the 4 G. 2, c. 28, but an application to the discretion of the court, for an indulgence which was frequently granted under similar circumstances before that act passed.

Per Curiam. In *Roe v. Davis* Lord ELLENBOROUGH says, "It may perhaps be true, that before the statute a practice obtained in this court of relieving the tenant up to the extent contended for: but it appears by the words of the act, that the legislature only meant to legalize that practice to a certain extent, viz., upon the application of the tenant *before* trial. If, therefore, we were now to extend the same relief to him *after* trial, we should be exercising the function of legislation instead of judicial construction, and should depart from the line which the statute has drawn." That case is expressly in point, and we approve of the principle upon which it was decided; this rule must therefore be discharged.

Rule discharged

FREEMAN v. ARKELL.

In an action for maliciously, and without probable cause, charging plaintiff with an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced into writing, and that he delivered them at the court of quarter sessions to the clerk of the peace or his deputy. The clerk of the peace stated that a bill of indictment for the assault was preferred, and that the grand jury return ignoramus, and that it was usual in such case to throw away or destroy the depositions; that he had searched among his papers, and could not find them: *Held*, that parol evidence of their contents was admissible; and that it was not necessary to call the deputy clerk of the peace to show that the original depositions were not in his possession, inasmuch as it was his duty, if he had received them, to have delivered them to his principal, and not being in his custody, it was to be presumed that they were lost or destroyed.

DECLARATION stated, that the defendant falsely and maliciously, and without any reasonable or probable cause, went before one J. Timbrell, being a justice of the peace for the county of Gloucester, and falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having violently assaulted and taken from his person, the precept of two justices which he was about to execute, and upon such charge procured the said J. Timbrell to grant his warrant for apprehending the plaintiff. It then stated that the plain-

tiff was apprehended and taken before the justice, &c. &c. Plea, not guilty. At the trial before PARK, J., at the last assizes for the county of Gloucester, Dr. Timbrell the magistrate, before whom the charge was made, was called as a witness on the part of the plaintiff. He stated that the defendant came before him in March, 1823, that the examination was taken in writing; and that he, the witness, at the Easter quarter sessions delivered the examination in court, either to Mr. Bloxam the clerk of the peace or his deputy, then sitting at the table, who usually received such papers. He, the witness, had a subpoena duces tecum, but he had no papers with him respecting the matter; he said, *495] "he did not know where the information was, but it was not in his possession. Edward Bloxam the clerk of the peace stated, that he had received many papers from Dr. Timbrell at the Easter sessions, but he could not find any but recognisances; that an indictment had been presented to the grand jury on behalf of the defendant, but that it was returned ignoramus, and it was usual on such occasions to throw away or destroy the papers relating to the charge. It was insisted on the part of the plaintiff that this was sufficient evidence to show that the original papers were lost or destroyed, and that parol evidence of the contents was admissible. The learned judge was of opinion, that as Dr. Timbrell said he had delivered the information to Mr. Bloxam or his deputy, the latter ought to have been called to prove that the examination was either destroyed or not to be found; and, consequently, that it was not sufficient evidence of the destruction or loss of the document to let in parol evidence of the contents. A rule nisi for a new trial was obtained in Michaelmas term by Pearson, on the ground, that under the circumstances proved, parol evidence was admissible.

Jervis and Russell now showed cause, and contended, that the plaintiff ought to have called the deputy of Mr. Bloxam to show that the depositions which were taken in writing were not in his custody. If they had done so, and he had stated that he had searched among his papers and could not find them, there would have been sufficient evidence to raise a presumption that they were lost or destroyed. Here it is consistent with the evidence of Dr. Timbrell and Mr. Bloxam, that the written depositions may be in existence and in the possession of the deputy of the latter.

*496] "BAYLEY, J. It was decided in *Brewster v. Sewell*, 3 B. & A. 296, that where a paper is useless, so that its loss or destruction may reasonably be presumed, very slight evidence of its loss and destruction is sufficient to let in secondary evidence; and I am of opinion, that in this case, the plaintiff did enough to let in the secondary evidence, for he subpoenaed Dr. Timbrell who took the information, and who, therefore, ought to have had it if it was not returned to the sessions, and Mr. Bloxam the clerk of the peace, in whose custody it ought to have been if it had been returned to the sessions. Dr. Timbrell stated, that he had delivered it at the sessions to the clerk of the peace, or his deputy at the table. Now, the clerk of the peace was the person to whom such papers ought to have been returned for the purpose of being produced to the chairman of the magistrates at the quarter sessions. If it were delivered to the deputy, it was his duty to deliver it to Bloxam, and the plaintiff had a right in that case to expect that Bloxam was in possession of that document. He stated, that when a bill of indictment is thrown out, it is usual to throw away the information as useless. That certainly is not a prudent course to adopt, but still the evidence is, that such was the practice. The bill of indictment having been returned ignoramus, the presumption therefore is, that this instrument was considered a useless paper, and thrown away and destroyed. That being so, I think, that under these circumstances, there ought to be a new trial.

HOLROYD, J. I am of the same opinion. It appears to me that the plaintiff *497] in this case, by subpoenaing Dr. Timbrell and Mr. Bloxam, used due diligence to get the original document which was the best evidence. If

there were no other evidence, as to what had become of the original depositions than that given by Mr. Bloxam, I think it would not be sufficient to let in the secondary evidence; for then it might be said, that the plaintiff might have inquired of Dr. Timbrell whether he had delivered in the depositions or not. Dr. Timbrell however states, that he delivered them at the sessions either to Mr. Bloxam or his deputy, and he speaks of both being at the table at the time when they were delivered. Now if they were delivered to the deputy, they were delivered to him as the agent of Bloxam, and they were delivered not for his own purposes, and therefore, are not to be presumed to be among the private papers of the deputy, but among those papers which ought to be in Bloxam's custody as clerk of the peace. Mr. Bloxam states that he had searched among those papers and could not find the information. Now, inasmuch as the depositions ought to have been in his custody if they existed, and he had searched and could not find them; I think that the plaintiff had done sufficient to let in the secondary evidence, and to rebut all suspicion that he had recourse to the secondary evidence, because that might make for him when the primary evidence would make against him.

BEST, J. Secondary evidence is not to be admitted until a party has taken all reasonable pains to obtain the primary evidence. The degree of trouble to be taken for that purpose depends upon the nature of the instrument. If the instrument be of value, or of such a nature that the reasonable presumption is, that it is *in existence, stricter evidence is required in order to show [*498 that it is destroyed or lost. If it be an instrument of no value, then the reasonable presumption being, that it has been destroyed or lost, slight evidence only of its destruction or loss is required. That principle is fully established by the case of *Brewster v. Sewell*. Now it is impossible, that the plaintiff in this case should have any interest in keeping back the original information. Then has he taken all reasonable pains to procure the best evidence. In the first place, in whom ought the possession of such an instrument to be? It appears that it is not the practice in cases of misdemeanors to return these informations to the assizes or sessions. It is not required by law. The plaintiff delivered to Dr. Timbrell a subpoena duces tecum, commanding him to produce the original depositions. He ought to have told the plaintiff then that he could not comply with that subpoena, but without being told that, the plaintiff goes further and subpoenas the clerk of the peace. The plaintiff, therefore, provided himself with the testimony of the person who ought to have had the depositions if they were not returned to the sessions, and of the person who ought to have had them if they had been returned. If the deputy of Mr. Bloxam received them, he received them for his master, and in due course would have placed them among his papers, and not being found among them, the fair presumption is, that they are lost or destroyed.

Rule absolute.

Campbell and Godson were to have argued in support of the rule.

*RICHTER v. HUGHES.

[*499

By a local act for building a chapel, the trustees therein mentioned were authorized to appoint a treasurer, clerk, and other officers, and out of the moneys to be received by virtue of the act, to pay such salaries to them as they (the trustees) should think reasonable, and out of the same fund they were to pay to the curate a yearly salary, not less than 150*l*. They were authorized to borrow any sum at interest, not exceeding 30,000*l*., which moneys so borrowed, and the interest thereof, were to be made payable out of the burial fees, and out of the rates and assessments to be made in pursuance of the act. They were also authorized to grant annuities, provided the money so raised by annuities did not exceed the whole sum intended to be raised for the purposes of the act. They were authorized also to make an assessment on the occupiers of houses, lands, &c., within the parish, not exceeding 2*s*. 6*d*. in the pound on the yearly value, and the rates were to be applied by them to the purposes of that act during such time as any of the moneys to be borrowed upon the credit of the act

should remain unpaid, or the annuities granted should have continuance; and by another clause, the trustees were empowered to take a distress for non-payment of the rates. The trustees appointed under this act raised a sum of 32,636*l.*, partly by annuity and partly by borrowing upon common interest; and made a rate to pay the annuities and the interest upon the whole money borrowed. A distress having issued, the plaintiff replevied, and the defendant avowed, as collector of the rates imposed by the act. The plaintiff, after setting out several clauses in the act of parliament, pleaded, that before the making of the assessment, the trustees had wrongfully borrowed more than the sum of 30,000*l.*, which by the act they were authorized to do, viz., 136*l.* by annuities, and 2500*l.* by borrowing, and that the rates were made, amongst others, for the purpose of paying the said annuities and money borrowed. Replication, that the burial fees were insufficient to answer the purposes of the act, and that the annuities granted by the act were in existence, and that it was necessary for the trustees to raise money by assessments, in order to carry into effect the purposes of the act, and that the assessments were duly made pursuant to the act, and without stating that the rates were made for the purpose of paying the annuities and money borrowed, or any other purpose whatever: *Held*, upon demurrer, that the plaintiff was entitled to judgment, inasmuch as the act of parliament only authorized the trustees to borrow a specific sum, and the rate having been made to pay the interest due upon the whole sum borrowed, was bad in toto, although the defect did not appear upon the face of it.

DECLARATION in replevin for taking plaintiff's goods. The defendant avowed, as collector of rates imposed by 51 G. 3, c. 134, entitled, "An act for erecting a chapel of ease at Islington," for several assessments upon the plaintiff duly made by the trustees for the purposes mentioned in the act. The avowry stated a demand by the defendant upon the plaintiff, that he was summoned before a magistrate for non-payment, and upon default warrants were issued, under which distress was made. Plea in bar, that by the act, under and by virtue and for
 *500] the purposes of which the said *assessments or rates were made, it was enacted that it should be lawful for the trustees to erect and build a chapel, with vaults under the same for the burial of the dead, and also to enclose a sufficient quantity of ground for a cemetery or burial-ground thereto; that the trustees were empowered to borrow any sum of money necessary for the purposes of that act, not exceeding in the whole the sum of 30,000*l.*, which moneys so to be borrowed, and the interest thereof, were thereby charged upon, and made payable from time to time out of the fees and sums of money which should be received by the collector for the time being, on account of the burials in the said burial-ground, and out of the rates and assessments to be made in pursuance of that act: and for securing the repayment of the money so to be borrowed, and the interest thereof, the said trustees in manner therein mentioned were authorized to assign over the same fees and sums of money, rates, and assessments, to persons advancing and lending such money from time to time, and when they should judge necessary to grant annuities to any person who should contribute, advance, and pay unto the said trustees, any sum of money for the absolute purchase of any annuity, and payable during the life of every contributor, so that the whole money to be raised by the granting of annuities as aforesaid, did not exceed the whole sums intended to be raised for the purposes of that act; and every annuity was thereby charged upon and made payable out of the fees, sums of money, rates, and assessments, to be made under and by virtue of the said act. The plea then set out the 35th sec-
 *501] tion of the act, which recited, that the fees or sums of money to be *payable in respect to burials or interments of the dead in the said new chapel or burial-ground, would be insufficient to answer the purposes of that act; and then enacted, that it should be lawful for the trustees to make assessments or rates upon all the then present and future tenants and occupiers of any house, buildings, &c., within the parish, according to yearly improved value of the premises, and as the same were ascertained and rated in the poor-rate books of the said parish for the time being, and not exceeding the sum of 2*s.* 6*d.* in the pound of the yearly value of such buildings, lands, &c.; and which rates or assessments should be paid quarterly, and the same when received, were thereby vested in the trustees in trust, to be applied by them for the purposes of that act, for and during such time as any of the moneys to be borrowed upon the

credit of that act should remain due, or any of the annuities to be granted in pursuance or by virtue of that act, should have continuance and no longer.^(a) Averment, that before the making of the said several assessments and rates in the avowry mentioned, the said trustees had wrongfully, without any lawful authority, and in excess and abuse of the powers and *authority given to them by the act, raised by way of annuity, and by borrowing a sum much beyond the said sum of 30,000*l.*, which sum and no more they were by the said act authorized and empowered to raise either by annuities or borrowing, to wit, the sum of 30,136*l.* by annuities, and the sum of 2500*l.* by borrowing, and exceeding by 2636*l.* the sum they were by the said act empowered to raise as aforesaid; that the said several assessments and rates in the avowry mentioned were made, for, among other purposes, the purpose of paying the said annuities, and the said money so borrowed as aforesaid, and which so exceeded the sum by the said act authorized to be raised as aforesaid, and so wrongfully raised as aforesaid. And that the said rates or assessment in the said avowry mentioned, were not made for the purposes and according to the said act, but were each illegal and void. Replication, that at the time of making the assessments or rates in the avowry mentioned, the fees payable in respect of burials in the chapel and burying-ground were insufficient to answer the purposes of the act; and that divers annuities granted in pursuance of the act then had continuance, and that, at the time of making the rates, it was necessary in order to raise money to carry into effect the purposes of the act, to make an assessment or rate in the manner mentioned in the act of parliament, and the said assessments or rates were respectively made upon the tenants and occupiers, and according to such yearly rent or value as in the act required; and each of the assessments was made, and was upon the face thereof stated to be made by five or more trustees, &c., met in the vestry-room, and for certain times therein *mentioned respectively, pursuant to the powers vested in them by the act, without specifying any purpose for which such as- sessments or rates were so made; and that none of the said assessments or rates were by the title thereof, or otherwise expressed to be made for any such purposes as in the plea mentioned; and that the said rates and assessments were respectively made pursuant to the powers vested in the trustees by the act, and were in fact made for, amongst other purposes, the purpose of paying the annuities so lawfully granted under and by virtue of the said act of parliament, and so then continuing. To this replication the plaintiff demurred. [*503]

Chitty was to have argued in support of the demurrer, but the court called upon

Parke, contra. It is admitted upon these pleadings that the trustees have raised 2636*l.* beyond 30,000*l.* Now, assuming that it was illegal for them to raise money to be appropriated to the payment of the excess above that sum, still the rate on the face of it was good, and the collector had a right under this act of parliament to take the distress. In cases of this description the question has always been, whether the rate on the face of it appears to have been made for legal or illegal purposes, *Rex v. Hardy*, Cowp. 579; *Rex v. Brograve*, 4 Burr. 2491. If it be for legal purposes the rate has been held to be good, even though the money raised may have been likely to be misapplied. In *Rex v. The Mayor and Burgesses of Gloucester*, 5 T. R. 346, the rate *was for more than it ought to have been, for the act under which it was made [*504]

(a) Besides the clauses of the act set out in the plea, the following sections were referred to in argument. The seventh section, by which the trustees were authorized to appoint a treasurer, clerk, and collectors, and such other officers and persons as they (the trustees) should think proper, and out of the moneys to be received by virtue of the act, to allow and pay such salaries, wages, and allowances to those officers as they (the trustees) should think reasonable. Section 26, by which the trustees were authorized, out of the fees and rates, to pay every year to the minister or curate any sum not less than 150*l.* Section 30, by which the trustees were authorized, out of the same fund, to pay to the clerk of the chapel for his salary such sum as they should think proper.

empowered the making of a rate to reimburse existing overseers their reasonable expenses, but the rate was really for raising a sum to reimburse former overseers; the court, however, held themselves bound by what appeared on the face of the rate itself, and decided that it was good. Here, the trustees have the power of making a rate, provided it shall not exceed 2s. 6d. in the pound. But the rate is not rendered bad because there may have been an intention on the part of the trustees to apply a small part of the money raised to illegal purposes. It is admitted upon the pleadings, that the rate was duly made; that the burial fees were insufficient to answer the purposes of the act; that annuities were in existence; and that it was necessary for the trustees to raise money by assessments, to carry into effect the purposes of the act; and that the purposes mentioned in the plea were not mentioned in the assessments; it was, therefore, a good rate upon the face of it. Although the trustees have, in fact, raised more money than they were authorized to do, that, according to the authorities, is no objection to the rate itself; but the party, if he objected to the quantum of the rate, ought to have appealed to the quarter sessions. [BAYLEY, J. There is a material distinction between this case and the cases which you have cited. They were the cases of poor-rates. Now, the overseers of the poor are at liberty from time to time to raise prospectively by rates, sufficient sums for the relief of the poor. Those sums cannot be specifically limited; for the overseers cannot, a priori, say how much they shall want for such a purpose. Here, on *505] the other hand, the "trustees are authorized by the act, in the first place to raise a definite sum by loan or annuity, and then to raise by rate so much money as will be sufficient to pay either the common or annuity interest upon the sum borrowed, together with such sum as is sufficient to pay the salary of the clergyman.] The sum which the trustees are empowered to borrow is definite and specific, but that which they are authorized to raise by rates is indefinite. By the seventh section they are authorized out of the moneys to be received under the act, to pay such salaries, &c., to the treasurer and other officers as they shall think reasonable. The sums are indefinite; there is no limitation, therefore, to the sums which they are authorized to raise. They are authorized to raise money for a variety of purposes, and those purposes include the interest of a specific sum. Although they have borrowed more than that sum, still the rate has been raised for the purposes of the act, and that is sufficient. The only limitation put upon the rate in the clause empowering the trustees to make it is that it shall not exceed the sum of 2s. 6d. in the pound.

BAYLEY, J. The question in this case arises upon the validity of a rate made under the provisions of a local act of parliament passed for a specific purpose. That act empowers the trustees to borrow money, and to raise money by rates for certain purposes specified. One of those purposes is to keep down the interest of money borrowed; and they are entitled to raise money either by borrowing or by way of annuity; but their power of borrowing is limited, for the sum borrowed is not to exceed the sum *506] of 30,000l. The act of parliament, "therefore, gives a special power, and that power ought to be strictly followed, and as it authorizes them to borrow a certain sum of money, and afterwards, by rates, to pay the interest of the money borrowed, they have no right to borrow beyond the specified amount, or to raise rates to pay interest upon any higher sum. It has been argued that, as the trustees are authorized to raise money by assessments, and that as the payment of interest is not the only purpose to which the money is applicable, the rate is a good rate, and that the intention of the trustees to misapply part of the money, does not render the rate invalid, but only gives the party upon whom the rate is to be levied, a right of appeal or of action, if the money raised should be misappropriated. It appears to me, however, that there is this fallacy in that argument. The vice, instead of being in the disposition

or appropriation of the money, is in the original raising of the money; for the quantum of the rate is increased by including in the amount this which I call illegal interest, and therefore the rate is void in toto. The trustees had a power to raise 30,000*l.* only, and they would have to pay therefore the interest on that sum, besides certain salaries. Then they would have a right to raise as much more as might be requisite for the payment of these salaries; but beyond that they have no right to go. There is a material distinction between this case and that of *Rex v. The Mayor and Burgesses of Gloucester*. There, the money to be raised was for the relief and support of the poor. The expense would vary from day to day; it is necessary in such cases to raise money prospectively, so that there may be always some in hand, in order to meet whatever *demands may occur. The power of making rates for the poor is not confined to certain limits, but as much money is to be raised as the over- [*507] seers think fitting and necessary. The objection in that case was, that the parties meant to misapply a part of the money, and it was held that that did not make the rate bad in toto, upon the ground that the parties were warranted in raising a sum of money to the full amount of what they did raise. In the present case, on the other hand, the parties were not warranted in raising money to the amount which would be raised by this rate. It is this circumstance which, in my opinion, makes the rate bad in toto, and the warrant bad in toto. The party upon whom the distress has been levied was liable to contribute only an aliquot part of the sum authorized to be raised by the act. In this case the plaintiff was rated and distrained upon for more than he was by law liable to pay, and the defendant had no authority so to distrain upon him. There are cases in which it has been held that if, under a warrant of distress, more be claimed of a party than he is liable to pay, the warrant is bad in toto. For these reasons, it seems to me that the distress was illegally taken, and that the plaintiff is entitled to the judgment of the court.

HOLROYD, J. I am of opinion that this rate is bad. The cases which have been cited are very different from the present. In *Rex v. The Mayor and Burgesses of Gloucester*, a general power was given to the persons who were to make the rate, to make such a rate as in their judgment they should think fit and proper for the maintenance and relief of the poor. The objects of that *rate were of necessity all in prospectu. It was not intended to pay any [*508] moneys borrowed, or due, or becoming due. Now the present rate was not for any thing in prospectu, but to pay debts already incurred, with respect to moneys borrowed either upon interest or annuity, or with respect to moneys due to the clergyman or the officers. Those sums were to be paid out of the moneys raised or otherwise received under the authority of the act of parliament. Now, taking the general purport of the act as it appears from its enactments, and especially adverting to the words of the thirty-fifth section, it seems to me that these trustees had a power to raise certain moneys for the purpose of paying the interest of the original sum which they were authorized under the act to raise, and likewise of paying the salaries mentioned in the act; but those were not matters in prospectu. The money to be raised was to be applied to the payment of money already actually borrowed, or then actually due, and therefore could not be for payment of salaries afterwards to become due, and not due at the time of making the rate. These trustees must know that, if they borrow beyond the sums which they are empowered to borrow under the act of parliament, they are going beyond the power given them to raise money to be applied to the purposes of the act, one of which is the repayment of the money there specified. If they raised money by rates beyond the legal amount of the interest of 30,000*l.* as soon as the interest upon that sum is paid, there is a complete end of their power to make rates at all. I think, in this case, the objection is to the rate itself, though it would be otherwise in a poor-rate, where

the money is to be raised and expended according to contingencies as they arise.

*509] **BEST, J.** The question raised by the pleadings in this case is neither more nor less than this, viz., whether a party who has a limited authority under an act of parliament, may come forward and avow that he has abused the provisions of the act, and at the same time pray to be protected. It appears that the trustees had a power to raise the sum of 30,000*l.*, and that they have actually raised 32,656*l.* They have made a rate to pay the interest of the larger sum, and the distress in this case issued in order to levy that rate. The plaintiff resists the distress, on the ground that the trustees have wrongfully borrowed 2656*l.* beyond the sum of 30,000*l.*, which the act authorizes them to borrow, and that this circumstance has made their rate illegal and void; and the answer to this plea of the plaintiff is, that the rate was expressly made for the purpose of covering such illegal excess; for it is admitted that the trustees have borrowed more than they were entitled to borrow; but they say by the pleadings, that at the time of making the assessment, the burial fees were insufficient to answer the purposes of the act, and that the annuities granted by the act were in existence; that it was necessary to raise money by assessments, in order to carry into effect the purposes of the act, and that the assessments were legally made, and were stated so to be made according to the purposes of the act, and without specifying any purpose for which they were made. The substance of the answer is, that the rate, on the face of it, appears to be for legal purposes, but that it is not made by legal authority; for where the authority is a limited authority, can it be any justification to say that, being empowered to raise only a certain sum, they have in fact levied more? *The King v. The Mayor and* *510] *Burgesses of Gloucester* is distinguishable, because there, the money was properly raised in the first instance. The ground of the decision in that case was, that the money having been properly raised, it was not competent for the court to quash the rate because the money might be misapplied. But here the money was not properly raised, for it was raised for the purpose of being applied to a purpose not contemplated by the legislature. But it is said that this should have been made the subject-matter of appeal, but if that which has been done, has been done without authority, it is null and void. If the act done by the trustees had been legal, and the money had afterwards been misapplied, that undoubtedly would have been a proper subject for an appeal; for then they would have been justified in raising the money, but not in its application. But here it is distinctly admitted in the pleadings that the first act was illegal. I am therefore of opinion that this rate was not raised for the purposes contemplated by this act of parliament, and that the distress which was issued to enforce it was illegal, and that our judgment must be for the plaintiff.

Judgment for the plaintiff.

*511]

*PHILLIPS v. BISTOLLI.

By the conditions of a sale by auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid: *Held*, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other.

ASSUMPSIT for goods sold. Plea, non-assumpsit. At the trial before **ABBOTT, C. J.**, at the Middlesex sittings after Hilary term, 1823, the following appeared to be the facts of the case. The plaintiff was an auctioneer, and in July, 1822, had put up for sale, among several other articles, a pair of ear-rings, the pro-

party of a jeweller, described in the catalogue as brilliant top and drop ear-rings; one of the conditions of sale was, that the purchaser should pay 30 per cent. upon being declared the highest bidder, and the residue of the price before the goods were removed. The defendant was a foreigner, and did not fully understand the English language: but he was in the habit of attending the plaintiff's sales, and purchasing goods. On the day in question he attended, and bought several lots, and the ear-rings in question were knocked down to him as the highest bidder, at the price of 88 guineas. They were immediately delivered to him, and he received them without making any objection. After they had been in his hands three or four minutes, a person who interpreted for him said to the plaintiff that the defendant had bid for the lot in question under a mistaken idea that the price at which it was knocked down to him was 48 guineas. The plaintiff said that the last bidding had been mentioned three times. The defendant then returned the ear-rings. The plaintiff, however, refused *to take them back, but said he would keep them on defendant's account. [*512 It appeared further, that if they were Assyrian garnets, they would be worth about 50*l.* only, but if they were rubies, they would be worth the price at which they were knocked down. And it was doubtful, upon the evidence, whether they were rubies or garnets. It was objected, on the part of the defendant, that there was no acceptance of the goods by him so as to take the case out of the statute of frauds. The lord chief justice, however, was of opinion that there was a sufficient acceptance, provided that the defendant was under no mistake when he bid the 88 guineas, and left it to the jury to find whether the defendant was mistaken in the price at the time when he bid the 88 guineas, and the jury having found that there was no mistake, a verdict was entered for the plaintiff. In last Easter term a rule nisi was obtained by *Scarlett* for a new trial, upon the ground that there was no acceptance, inasmuch as the plaintiff had a lien upon the goods until the price was paid, and he could not therefore have intended to part with the possession of the goods. In order to satisfy the statute of frauds there must be a delivery by the vendor, with the intention of parting with the possession of the property sold. Now, here it is not to be presumed that the plaintiff intended to part with the possession of the property until the price, or the deposit mentioned in the conditions of sale, was paid. At all events it was, under the circumstances, a question of fact for the jury, whether the delivery was made by the vendor with the intention of parting with the possession, and whether the defendant accepted the goods with the intention of acquiring the right of possession *as owner. *Chaplin v. Rogers*, 1 East, 192; *Blenkinsop v. Clayton*, 1 B. Moore, 328. [*513

Gurney and Comyn now showed cause. It is sufficient to satisfy the statute of frauds if the defendant for a single moment accepted the goods. *Carter v. Toussaint*, 5 B. & A. 855. Here they must have been delivered by the vendor with the intention of vesting the right of possession in the vendee as owner. [HOLYORD, J. Then you say that the vendee would have had a right to take the goods away, although the auctioneer had insisted upon the price being first paid.] The plaintiff waived his right to the payment of the price of the deposit, by delivering the goods. Here, upon the evidence, it appears at least that the goods were delivered to the defendant as owner, that he received them without objection, and that he kept them in his possession for three or four minutes. There was therefore an acceptance by him as owner during that interval.

Per Curiam. In order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner. It lies upon the plaintiff in this case, to make out that there was such delivery and acceptance. Now, here by the printed conditions of sale, a deposit of thirty per cent. was to be paid upon the

party being declared the highest bidder, and the residue of the purchase-money when the goods were removed; and it is not to be presumed that the vendor intended, contrary to that condition, to part with the right of possession until the deposit or price was paid. There was, therefore, very slight evidence to show that the plaintiff intended to part with all control over the goods when he delivered them. Then was there any acceptance by the defendant as owner? It appears that a very short interval elapsed after the lot was knocked down, before the defendant objected that he had been mistaken in the price. Unless, therefore, the retaining of them for the three or four minutes that intervened, was evidence of an actual acceptance by him as owner, it is clear that there was not any acceptance afterwards. That, at all events, was very slight evidence of an acceptance by the defendant as owner, and it ought at least, under all the circumstances, to be submitted as a question of fact to the jury, whether there was a delivery by the vendor and an actual acceptance by the vendee, intended by both parties to have the effect of transferring the right of possession from the one to the other.

Rule absolute

*515]

*LOARING v. STONE.

By a turnpike act, a toll of 4*d.* was imposed upon every horse or other beast drawing any coach or other carriage, for every horse drawing singly any carriage, the same toll; for every horse drawing any wagon or other such carriage drawn by two horses or more, the sum of 3*d.*; for every horse laden or unladen, and not drawing, the sum of 1*d.* The statute then provided that no person should be liable to pay toll more than once in any one day at any toll-gate for passing and repassing in any one day with the same horses and carriages through the same, but all persons having paid toll once, and producing a ticket denoting the payment of such toll, were afterwards to pass and repass with the same horses and carriages toll free during the same day. A stage-coach, drawn by four horses, passed through a gate erected under this act of parliament, and paid the toll. In the evening of the same day, a different coach, called by the same name, belonging to the same proprietor, driven by the same coachman, and drawn by the same four horses, but carrying different passengers and different parcels for hire, passed through the same gate: Held, that a second toll was payable in respect of this carriage and horses.

TRASPASS for taking and detaining the plaintiff's horse. At the trial before BURROUGH, J., at the Summer assizes, 1823, for the county of Devon, the jury found a verdict for the plaintiff, damages one shilling, subject to the opinion of this court on the following case.

By a local act of the 47 G. 3, "for repairing and improving the road from the Honiton turnpike-road near Yard Farm, in the parish of Lepottery, in the county of Devon, to the Ilminster turnpike-road near the village of Horton, in the parish of Ilminster, in the county of Somerset;" trustees were appointed with power to erect toll-gates. By section 10 it was enacted, "that the several tolls hereinafter particularly mentioned, shall be demanded and taken at each of the said toll-gates or turnpikes which shall be erected in pursuance of this act, (except as hereinafter expressly directed or provided to the contrary,) before any horse, cattle, or beast, upon which any toll is by this act imposed, shall be permitted to pass through the same, (that is to say:) For every horse, mare, gelding, or other beast drawing in any coach, chariot, barouche, chaise, curricule, *516] landau, berlin, calash, hearse, or other carriage, the sum of 4*d.*: for every horse, mare, gelding, or other beast drawing singly or alone, any carriage of any description whatsoever, the sum of 4*d.*: for every horse, mare, gelding, or other beast drawing any wagon, wain, cart, or other such carriage drawn by two horses or beasts of draught, or more, the sum of 3*d.*: for every horse, mare, gelding, mule, or ass, laden or unladen and not drawing, the sum of 1*d.*" By section 18, "No person or persons shall be liable to pay toll more than once at any one toll-gate or turnpike to be erected by virtue of this act, for passing and repassing at any time or times in any one day (to be com-

puting from twelve of the clock at night to twelve of the clock in the succeeding night) with the same horse or horses, cattle, beasts, and carriages through the same toll-gate or turnpike; but, that all and every person and persons having paid toll once as aforesaid, and producing a ticket denoting the payment of such toll, (which ticket the collectors of the tolls are hereby required to give gratis on receipt of the toll,) shall afterwards pass and repass with the same horse or horses, cattle, beasts, and carriages, toll free during the same day through the same toll-gate or turnpike where such toll was paid. Provided always, that not more than one toll shall be taken from any person or persons for passing or repassing the same day with the same horse or horses, cattle, beasts, and carriages, through all the toll-gates or turnpikes to be erected by virtue of this act; but that every person having once paid the toll by this act imposed, and producing a ticket denoting the payment hereof, (which ticket the collectors of the tolls are hereby required to give gratis on the receipt of such tolls,) shall pass and repass with the same horse or horses, cattle, beasts, and carriages, toll free during such *day through all the other toll-gates or turnpikes to be erected in and upon these roads." By section 13, "If any person shall refuse to pay [517 the toll after demand thereof made, it shall be lawful for the toll collector to seize and distrain any horse, cattle, or beast, upon which any toll is imposed by this act." Under this act toll-gates have been erected, and among others one called the Devon gate, to which the defendant on the 11th April, 1823, was the keeper and toll collector. On that day the Bath and Exeter subscription coach, driven by one William Wager, (as servant of the proprietors,) drawn by four horses, and carrying passengers and parcels for hire, passed through the Devon gate in its way from Exeter to Bath. The toll of 1s. 6d., being 4½d. for each horse, was paid by the driver on passing through the said gate, and a ticket denoting the payment of the tolls was given by the defendant to W. Wager. In the evening of the same day, a different coach called by the same name, and belonging to the same proprietors, driven by the same coachman, and drawn by the same four horses, but carrying different passengers and different parcels also for hire, passed through the same gate on its way from Bath to Exeter; the driver, W. Wager, produced a ticket which had been given to him in the morning, but the defendant insisted on taking a second toll of 1s. 6d.; and upon the driver's refusing to pay this second toll, the defendant took one of the horses from the coach, and retained it until the sum of 1s. 6d. was paid to him by the driver, W. Wager. The gate called the Devon Gate, is within the county of Devon, and the horse so taken was the property of the plaintiff, Loaring, one of the proprietors of the coaches.

Fraser, for the plaintiff. Here the toll is imposed by *the enacting clause upon horses only, and upon horses drawing as well as those not drawing. [518 It appears by the proviso, that the legislature thought that it was sufficient for the purposes of the trust, that for the same thing, and on the same day, one toll only should be payable. The exemption ought to be construed as commensurate with the toll, and as the toll is imposed upon horses drawing as well as upon horses not drawing, the exemption of "horses" in the proviso cannot be considered as confined in its application to horses not drawing, *Gray v. Shilling*, 2 B. & B. 30. Indeed it seems probable that the word "carriages" was inserted in the clause in order to show, that the exemption was meant to extend to horses drawing carriages as well as to others. Here, at all events, taking the two clauses together, it is by no means clear that the toll is due, and it is incumbent upon those who seek to impose a burden upon the public to show that their claim rests upon clear and unambiguous language. *Leeds and Liverpool Canal Company v. Hustler*, 1 B. & C. 424.

Adam, contra, was stopped by the court.

BAYLEY, J. This case does not admit of any reasonable doubt. All cases

of this description depend upon the manner in which the act of parliament is worded. Tolls are imposed in consideration of the injury done to the roads by the horses and carriages passing over the same. The degree of injury depends on the manner in which the horses are employed. Now, in this case, the enacting clause imposes, first, a toll of 4*d.* upon every horse drawing in *519] any coach, chariot, &c.; secondly, a *similar toll upon every horse drawing singly any carriage whatever; thirdly, a toll of 3*d.* upon every horse drawing any wagon or other such carriage drawn by two horses; and, fourthly, a toll of 1*d.* upon every horse not drawing. The toll is therefore imposed upon the horse, and not upon the carriage; but then by the eighteenth section, no person is to pay toll more than once at any one gate for passing and repassing in any one day with the same horse or horses and carriages, but every person having paid toll once, and producing a ticket, shall afterwards pass and repass with the same horse or horses and carriages, toll free. Now, as no toll was imposed by the enacting clause upon the carriage, there could be no reason for introducing that word into the proviso, unless it were intended to confine the exemption in respect of horses drawing carriages to the same horses drawing the same carriage; and it may be very reasonable that the exemption should be limited to that case, for otherwise the same horses, with a different hired chaise, and with different travellers, would be exempt from the payment of toll.

HOLROYD, J. I am of the same opinion. The act imposes the toll upon horses, according to the manner in which they are employed. By the enacting clause, toll would be payable in respect of every horse every time it passed the gate. The party, therefore, claiming the exemption must show that he comes within the terms of the proviso. Now here the plaintiff cannot bring himself within the proviso, unless some of the words contained in it be altered, or rejected altogether. The word "carriage" occurs several times in the proviso, *520] and accompanied with such other words as show *clearly that there must be both the same horses and the same carriage, in order to entitle a party passing the gate a second time to the exemption.

BEST, J., concurred.

Judgment for the defendant.

CATHERINE MARTHA MELLISH v. WILLIAM MELLISH, EDWARD MELLISH, and THOMAS MELLISH.

A. being seized in fee of an estate called H., subject to a mortgage for years, by his will, (in which there was a statement in figures of the amount of the estimated value of his entire property, of the sum which his wife had brought him on his marriage, and of the sum which he himself had settled upon his marriage, and of the estimated value of the estate at H.,) directed that his daughter C. M. should have the disposal of the sum which he himself had settled on his wife, and in case she did not dispose of it, that it was to go to certain persons therein named. He then desired that H. should go to his daughter C. M. as follows: in case she married and had a son, to go to that son; in case she had more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she had but one daughter or no child at that time, he desired it might go to his brother W. M. He then gave specific legacies nearly to the amount of the sum which remained, after deducting the money settled on his marriage and the value of the estate at H. And he directed that his daughter should pay an annuity to a person therein named for life; and then he made his brother W. M. his sole legatee: *Held*, that C. M. took an estate in tail male in H., with a reversion in fee, subject to the other estates created by the will.

This case was sent by the lord chancellor for the opinion of this court.

John Mellish being seized to him and his heirs in fee-simple of a capital messuage and other hereditaments, situate in the county of Hertford, and known by the general name of Hamels, subject to a mortgage for a term of years, made his will, which was duly executed by him, and of which the following is an exact copy and imitation, both in words and figures: that is to say,

Marriage settlement, £ 12,500 C. P.	£ 120,000
Do. 25,000 J. M.	
	<hr/> 120,000
	80,000
Hamels	<hr/> 40,000
	<hr/> 80,500
	<hr/>

*Catherine Mellish to have the disposal of the 25/m.; in case she does not dispose of it, I wish it to go to as follows: 5/16 W. M., 5/16 E. M., 3/16 T. M., 3/16 A. G. [*521]

The mortgage on Hamels to be paid off as soon as William Mellish can do it without prejudice to the business. Hamels to go to my daughter Catherine Mellish as follows: in case she marries and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother William Mellish.

* C. H. M.	£ 5000	(£ 3000.
W. M.	10,000	* These initials
E. M.	7000	mean my daughter,
A. G.	5000	my three brothers,
J. M.	5000	and my sister.

30,000

* £ 500 J. L. Bonhote.

200 Dessoulary.

200 Mouchet.

40 £ 40. Bentley, Miss S. Salmon £200.

50 J. Bonhote.

20 Macdonald.

1010

I give as follows:

* I desire that one thousand pounds of the three thousand pounds left her may be paid to my daughter, immediately on my decease.

Mrs. Pinfold to receive 200*l.* a year from Catherine Mellish, during the life of Mrs. Pinfold; a year's wages to all my household servants, and likewise to Webster, and I desire mourning may be given to all my servants, the same as at my dear wife C. M.'s death. I leave my dear brothers W. M., E. M., and J. M., my sole executors and guardians of my child Catherine Mellish, and I leave my brother, William Mellish, my sole legatee.

The testator departed this life on or about the 9th day of the month of April, 1798, without having *revoked or altered his said will, leaving the said Catherine Martha Mellish, in the said will called Catherine Mellish, the plaintiff, his only child, and heir at law. The question was, what estate and interest the said Catherine Martha Mellish took in Hamels. [*522]

Preston, for the plaintiff. Catherine Mellish took, under the will, an estate in tail male in Hamels. This construction will best answer the general intention of the testator; any other construction would place this property in a line of enjoyment contrary to his will. The first object of the testator's bounty is his own daughter. In contemplating her marriage he also provides for a son of the daughter; he does not name that son as an individual, but as a class, the word son being descriptive of all the male line. If the daughter take only an estate for life, it would follow as a consequence, that if she had one son and several daughters, and, during her life, the son died, leaving a son, the grandson would

be excluded by a daughter; and if the inheritance be suspended until her death, and is to vest only at that period, and she left a grandson and no son, then the grandson could not take; and if there be more than one daughter, at her husband's death, or her own death, and no son, the property would go to the eldest daughter, in exclusion of a grandson; and if there be only one daughter, and no son at that period, the estate would go to William Mellish. Therefore, if Catherine Mellish had several daughters, and one son, and he had a son, and died in his mother's lifetime, the eldest of the daughters would take in preference to the grandson; and if Catherine Mellish had, at her death, only one daughter, *523] but a grandson, descending from a son, William Mellish would *take, and the grandson be excluded. Such an intention is not to be imputed to the testator, unless the court are, by the express language of the will, compelled to give that effect to the will. It may be laid down as a general rule, that where a man devises to A. an estate for life, with remainder to his son or sons, then in favour of the intention of the deviser, (unless it be clear from the language of the will that the son is to take eo nomine, as purchaser,) the word *son* or *sons* will be construed collectively and as descriptive of all the male descendants, as a class, and the devise will give to A. an estate of inheritance in tail male. Catherine Mellish, the parent, does not take an estate in fee. From the peculiarity of the language of the will, her daughter might take as purchaser, because the general intention will not allow the parent to take an estate in tail female. Sons, however, and more remote descendants, being males descended from males, will take through the medium of being the heirs and descendants of Catherine Mellish, their parent. But what difficulty is there in deciding that the daughter of Catherine Mellish may take as purchaser, although the sons are to take by descent, through the medium of their parent. In *Wight v. Leigh*, 15 Ves. 564, the devise was to A. and after his death to his *first and other sons*, and in default of male issue, then to his eldest and other daughters, and to their heirs male for ever, and it was held that A. took an estate in tail male. In *Wharton v. Gresham*, 2 Bl. Rep. 1083, the testator devised all his estates, as well real as personal, to his nephew Anthony Wharton, and to his *sons* in tail male; and for want of such issue *524] male to his brother Captain John *Wharton, and to his sons in tail male, and in failure of such issue male, then to his right heirs. It was held that J. Wharton took an estate tail. The word *sons* was construed as a collective term, giving by that word the inheritance to the first or immediate devisees. In *Chorlton v. Craven*(a) the devise was to Thomas Chorlton during his life, with remainder to his first son in tail male lawfully begotten, severally and successively, (not saying to the second, third, fourth, and other sons,) and for want of such issue either of his son T. C. and his son J. C., then he devised the estate to his daughters and their children, share and share alike, to be held to them and their heirs for ever, as tenants in common, and not as joint tenants. It was held that Thomas was tenant in tail. This case was so decided by the court of king's bench on a case sent from the court of chancery, and the certificate of the king's bench was confirmed by the lord chancellor. The court of exchequer, in Trinity term, 1823, on the same will came to the same decision, and in each case the decree was against a purchaser. There is another class of cases which establish that the word *son* may include all the descendants. In *Sonday's* case, 9 Co. 127, Sonday devised a certain house to his wife for life, and, after her decease, *his son* William to have it; and if his son William married, and had by his wife any male issue, lawfully begotten of his body, then his son to have it; if he had male issue lawfully begotten of his body, then his son Samuel to have the house; if Samuel married, and had issue male of his body lawfully begotten, then his son to have the house after

(a) Not reported.

his decease; if no *issue male, then his son Thomas to have the house; if Thomas married, having a male issue of his body lawfully begotten, then his son to have the house after his decease; if he had no issue male, then to his son Richard in like manner, totidem verbis, and so to Daniel totidem verbis; and then he added this clause, "if any of his sons or their heirs male, issue of their bodies, went about to alien or mortgage the house, then the next heir to enter." It was resolved that an estate in tail male was created for three reasons, first, because the testator says, "if he hath no issue male, his next son to have it," which was as much as to say, "if William dies without issue male," which words were sufficient to create an estate tail in him. Secondly, the last clause, "if any of his sons or their heirs male, issue of their bodies, go about," &c., which explains the first words, that the male shall be heir and take by descent. Thirdly, the thing prohibited proved it; for if the sons only took an estate for life, this restraint would have been idle. In *Wyld v. Lewis*, 1 Atk. 432, the testator devised to his wife Elizabeth all his lands, &c., not settled in jointure. The devise was general; and then the testator said, "if it shall happen that my wife shall have no son or daughter by me begotten on the body of the said Elizabeth, and for want of such issue, then the said premises to return to my brother John Wyld, if he shall be then living, and his heirs for ever, only paying to his two brothers (A. and B.) the sum of 150*l.* within one year after the decease of the said Elizabeth;" and it was held, that the wife took an estate tail; and in that case the lord chancellor observed, that the inclination to avoid the *absurdity of excluding the grandchildren had been the principal reason for construing words of the singular number, and which are properly descriptive of particular persons only, in a collective sense, as including the descendants of the first taker. Also in *Robinson v. Robinson*, 1 Burr. 38, the devise was to A. B. for his life and no longer, and after his decease, to such son as he should have, lawfully to be begotten, taking the name of Robinson, and in default of such issue, then to the testator's cousin and his heirs for ever; and it was held by the court of king's bench, and afterwards in the house of lords, that A. B. took an estate tail. The effect of that decision was, that the words "son lawfully to be begotten," was a collective term, and included all the descendants in the male line. It therefore described all descendants of the person to whom the gift was originally made. If the word *son* be nomen collectivum, as taking in the whole class, it is a word of limitation, and not a word of purchase. (a) These authorities show that Miss Mellish took an estate in tail male, since otherwise the gift would be so narrowed as to produce great inconveniences; for if she took merely for life, her husband would be excluded from all benefit, though she died leaving a son. And if she died, leaving a grandson only, that grandson would be excluded by a daughter, so that a daughter would take in exclusion of a male descended from a male, and William Mellish might take though there was a grandson at the death of Miss Mellish, because no son was living when that event took place, while the intention clearly was, that if there should be *a male descendant, he and his male descendants should take in exclusion of a daughter, and that William Mellish should not take as against a son or more remote male descendant of Miss Mellish, or the eldest of two or more daughters, if there should be several daughters.

Tindal, contra. The fee either descended to Catherine Mellish, or it was devised to her by the will defeasible in three events; the first was, if she married and had a son, it was then to go to that son; secondly, if she had more than one daughter and no son, it then was to go to the eldest daughter; and, thirdly, if she had no child at all, it was to go to William Mellish, the testator's brother. These are executory devises, to take effect according to the rules applicable to that subject; and so that William Mellish might be entitled to

(a) See Lord Thurlow's reasoning in *Jones v. Morgan*, 1 Bro. CC. 219

the estate in fee. It may be conceded, that at the present time, and before the happening of any of these events, the fee is vested by descent in Catherine Mellish; for, whether the beneficial interest is to be given to her *for life*, with contingent remainders to the son, daughter, and William Mellish, in succession, or whether it is intended to be given her in fee with executory devises; in either case the fee is, in the meantime, in Catherine Mellish; for it is a general rule, that where a remainder of inheritance is limited in contingency by devise, the inheritance, in the meantime, if not otherwise disposed of, remains in the heirs of the testator, until the contingency happens to take it out of them. *Fearne*, 351. Therefore, if Catherine Mellish took an estate for life, with contingent remainders to her son, &c., the fee would be in her until the contingency happened. The question will be, *whether the testator has given her a particular estate, different from the fee which has descended to her, with contingent remainders, or whether the limitations to the son, daughter, and William Mellish are executory devises in defeasance of the fee-simple which has come to her either by descent or by the devise. Now the latter is most consistent with the general intention expressed by the testator. No intention is manifested by him to divide the fee-simple into particular estates and remainders. It is not given to her for life or in tail, but the terms used are, "Hamels is to go to Catherine Mellish." That implies that it is to go as an inheritance at law; that the whole of the estate and not a part of it is to go. The very circumstance of the annuity being made chargeable on Catherine Mellish immediately, shows that that must have been the intention, for otherwise she might have sustained a loss by reason of the annuity. *Com. Dig. tit. Devise, (N.) 4. Lee v. Withers*, Sir T. Jones, 107; *Andrew v. Southhouse*, 5 T. R. 292, are authorities upon this point. Besides, it appears from other parts of the will, that when the testator used the words "to go," he meant the entire interest. For in the early part of his will he directs that Catherine Mellish shall have the disposal of the 25,000*l.*; and in case she does not dispose of it, it is to go to other persons in proportions therein mentioned; and it appears also, from the preceding part of the will, when he used the word "Hamels," he meant the estate of inheritance which he had in Hamels; for in estimating the value of all his property, he placed against the word "Hamels" the figures 43,000*l.* It is clear, *529] therefore, that in the subsequent part of the will, *when he used the same term Hamels, he meant that entire interest in Hamels which he estimated to be of the value of 43,000*l.*; viz., the estate of inheritance. The testator appears, in the early part of his will, to have estimated the value of his whole property at 120,000*l.*; and he bequeaths in specific legacies nearly the whole of the 40,000*l.*, which was the sum that remained, after deducting the estimated value of Hamels, and the amount of the money settled upon his marriage, from the entire value of his property. It is clear, that if he had in terms devised the estate in Hamels, or all his interest in Hamels, that would have carried the fee; and if it can be shown, therefore, that by the word Hamels he meant his whole interest in it, then the whole of that interest will pass as well as if he had used the term. Now, although where the will leaves it in doubt, whether the devise is to operate as a contingent remainder or an executory devise, the court will construe it to be a contingent remainder; yet here, the question is not whether contingent remainders shall be construed as executory devises, but whether the court will give Catherine Mellish, by implication, particular estates, for the purpose of supporting these contingent remainders, the effect of which would enable her to defeat the testator's general intention. Now there is no case which goes to that extent. In *Walter v. Drew*, *Com. Rep.* 372, if the devise to Richard had been construed an executory devise, it would have been after general failure of William's issue, and would have been too remote; and therefore an estate tail was given to the eldest son by implication. The same observation applies to *Wealthy v. Bosville*, *Rep.*

temp. Hardw. 258. The fee, therefore, either goes to Catherine Mellish by descent, *or she takes it by purchase; and it is immaterial whether she take it by one medium or the other. The first event by which the fee [*530 given to Catherine Mellish is to be defeated, is in case she marry and has a son. Now the estate is not given expressly to Catherine Mellish for life, which would have been done if it had been intended that she should take that estate only; and there is a material distinction between the devise to the son and to the daughter. The latter is to take only at the death of her mother or her father, which shall first happen; but the former is to take immediately; for it is not necessary that he should be living at the time of her death. It is evident that the testator thought that he had given his daughter a sufficient provision for any one female; for in case Catherine Mellish should leave only one daughter, he gives the estate, not to that one daughter, but to William Mellish. Now it was quite as unreasonable to prefer his brother to his one granddaughter as to prefer his grandson to his daughter. Suppose Catherine Mellish married early, and had a son, and then lived to the age of eighty, why should the grandson wait till he attained the age of fifty or sixty before he takes and not take immediately, whilst his mother has such ample provision. [BAYLEY, J. Suppose Catherine Mellish had had a son who lived only two days, and then died, and then that she had another son born, would that son take? If he did he must take as a purchaser, for he could not derive title from the first son.] That is a very nice supposition, and not likely to have occurred to the testator. The testator was contemplating the founding of a family, and he was desirous to have a male relation to succeed him, and he prefers a son before his granddaughter or his daughter. [BAYLEY, J. Your argument would have this effect: *if Catherine Mellish had ten daughters, and each of them left children, [*531 but died before the mother, their issue would not take.] If she has more than one daughter, at her own or her husband's death, it is to go to the eldest daughter; but if none, it is to go to the testator's brother. The testator has so framed the devise that the children would take the personal property, but the real estate goes to the person whom he wished to represent his family, [BAYLEY, J. Suppose the eldest daughter of Catherine Mellish to have children, and a second, third, and fourth daughter, and that the eldest daughter, in the lifetime of the mother, dies, leaving children, and that the second daughter, in the lifetime of the husband, dies, leaving children, and that at the death of Catherine Mellish she has still two daughters living, who would take the estate?] The only question is, which construction most nearly satisfies the intention of the testator. As to *son* being nomen collectivum, the case of *Wight v. Lee* is distinguishable, because there, the words "in default of issue" were introduced. The same observation applies to *Wharton v. Gresham*, 2 Bl. 1083. As to the case of *Charlton v. Craven*, there were the words "severally and successively," which distinguish it from this case. In *Lovelace v. Lovelace*, Cro. Eliz. 40, it was held that a devise to one, and his eldest issue male, passed an estate for life only, but that a devise to one and his issue generally passed an estate tail. Robinson on Gavelkind, 37. [BAYLEY, J. In *Perrot's* case, Moore, 368, it is said that the lands mentioned in *Lovelace v. Lovelace* were gavelkind.]

**Preston*, in reply. The heir at law cannot be disinherited, unless there be words in the particular instrument to pass the estate from him. [*532 Nothing can be inferred from the direction that the mortgage was to be paid off. William Mellish was liable, and directed to pay it in his character of residuary legatee; and the annuity is not charged on the real estate, and therefore would be payable out of the personalty. It is clear, as a rule of law, that the gift cannot be construed as an executory devise if it can operate in any other mode. Now it is said, that the gift is to Catherine Mellish in fee, defeasible in three events; but if that be the effect of the will, what becomes of the husband. If the fee be determined by the executory devise, the courtesy will fail with it. and

that is inconsistent with the will; because the will supposes that the husband of Catherine Mellish is to have some interest, in the event, at least, of there not being any son; for the estate is to go to the eldest daughter either on the death of the husband or of the mother. It has been argued, that on the death of Catherine Mellish, if she should have a son, a son would take immediately. A daughter could take only if there was not any son, and if there were several daughters, the eldest daughter could take only a life-interest for want of words of inheritance. If Catherine Mellish had one son by her first husband, the son, if he took the fee immediately on his birth, would become the first purchaser and an ancestor; and if he died without issue, and there should be a second son of the half blood, that son could not take because the fee had vested by purchase in the first son; so that if the first son died without issue, leaving a sister of the *533] whole blood, and a brother of the half blood, it is clear that *the second son of Catherine Mellish would be excluded. Suppose again, Catherine Mellish to die leaving grandsons, they would not take unless she herself took an estate in tail male. Now, could it have been the intention of the testator to prefer his brother, if there were any male heirs descended from his daughter. It is absurd to suppose that the descendants of Miss Mellish are to be excluded, merely because there might not be any son living at her death. This is incompatible with the intention of the testator, and the scope of his will; were several daughters to exist, and all the daughters to die during Miss Mellish's lifetime, but to have left issue, could it be reasonably concluded that that issue of the eldest daughter could not take any benefit? The testator's intention clearly was, to prefer all the descendants of his eldest granddaughter to William Mellish. He otherwise would not have introduced words showing a preference of the eldest female as an heiress before his brother. *Bisfeld's* case was the earliest decision on which the word "son" was construed as a collective term.

BAYLEY, J. It may be collected from the authorities, that if the word *son* be used not as a designatio personæ, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is the manifest intention of the testator to give an estate tail; and it is equally clear, that words are not to operate by way of executory devise, which are capable of operating in any other way. In this case the words are, "Hamels to go to my daughter Catherine Mellish as follows, viz., in case she marry and *534] has a son, then it is to go to that son." Now, if the *word *son* be used as a nomen collectivum, it would give to Catherine Mellish an estate to continue so long as there should be any male descendants of Catherine Mellish, and that would be an estate in tail male. I cannot find in the subsequent part of this will, any thing inconsistent with the construction that ought to be put upon it if it had stopped here. We shall not, however, give our decision at present.

HOLROYD, J. It appears to me that the word *son* in this will, should be read *any son*. In the first place, the estate is to go to the daughter in a particular mode; for it is to go to his daughter "as follows," and he then describes the mode in which it is to go, that is, that a son should have it if Catherine Mellish marry and have a son; and he is then describing in what way the daughter shall have it, and supposing her son be to have the estate, he could only take it in that case by descent, unless the will operated as a gift to the daughter, and not only to the daughter, but subsequently as a gift to that son and another son, so as to be doing away with the life estate of the daughter. The words are, "in case she marry and has a son, to go to that son; in case she has more than one daughter at her or her husband's death, to go to the eldest daughter." Now, if the word *son* be construed to mean not an immediate descendant, but any son, whether immediate or remote, such as a grandson, then all difficulty seems to be removed; for, according to that construction, the limitation over to the eldest daughter would not take effect, even although the immediate son were

dead, if there were a grandson living, or a great grandson, so that the male descendants of his daughter would not be excluded; but if the word "son" be confined to the immediate son, the consequence would be, that if that son died leaving sons, the estate would go over to the daughters. [*535]

The following certificate was afterwards sent.

This case has been argued before us, and we are of opinion, that Catherine Mellish took an estate in tail male with a reversion in fee, subject to other estates created by this will.

J. BAYLEY.
G. S. HOLROYD.
W. D. BEST.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Hilary Term,

IN THE FOURTH AND FIFTH YEARS OF THE REIGN OF GEORGE IV.

MEMORANDA.

IN the course of the vacation Sir ROBERT DALLAS, knight, resigned the office of chief justice of the Common Pleas, and was succeeded by Sir *Robert Gifford*, knight, his majesty's attorney-general, who was called to the degree of serjeant at law. The motto on his rings was "*Secundis laboribus.*" He took his seat on the bench on the first day of this term, and was soon afterwards raised to the dignity of a peer of the realm, by the title of Baron GIFFORD, of St. Leonards, in the county of Devon.

In the course of last term Sir RICHARD RICHARDS, knight, the lord chief baron *538] of the Court of *Exchequer, died at his house in Ormond-street. He was succeeded by *William Alexander*, Esquire, one of the masters in Chancery, who was called to the degree of serjeant at law, and gave rings, with the motto "*Secundis laboribus,*" and took his seat upon the bench on the first day of this term.

Sir *John Singleton Copley*, his majesty's solicitor-general, was appointed to the office of attorney-general.

Charles Wetherell, of the Inner Temple, Esquire, was appointed to that of solicitor-general.

In the course of this term, Sir *John Simeon*, one of the masters in Chancery, died, and *William Wingfield*, Esquire, one of his majesty's counsel learned in the law, and *James Farrer*, of Lincoln's Inn, Esquire, were appointed to the vacant offices of masters in Chancery.

KING v. WILLIAMS.

Where, in debt on simple contract, the defendant waged his law, the Court refused to assign the number of compurgators with whom he should come to perfect his law.

DEBT on simple contract. Defendant pleaded *nil debet per legem*; and the master having appointed a day for the defendant to come into court with his compurgators,

Langslow applied to the Court to assign the number of compurgators, with whom the defendant should come to perfect his law. The books leave it doubtful whether six or eleven are necessary. In *Les Termes de la Ley*, p. 442, (which book is ascribed to Rastall, by the preface to 10 Co., and is there mentioned as

a work of high estimation) is this passage: "Mes quant un gagera son ley, il amesnera ovesque lui 6, 8, or 12 de ses vicines *come le court lui assignera de jurer ovesque lui." [BAYLEY, J. Is it not said in Blackstone's Com. that eleven are necessary?] Vol. iii. 343. It is, but his opinion is founded on Co. Lit. 295, and 2 Inst. 45, and the authorities there cited, viz., Fleta, b. 2, c. 63, and 33 H. 6, 8, do not support the position. In Fleta it is stated, that the number of compurgators shall depend upon the number of the secta, produced by the plaintiff; that is to say, if the secta consists of two, the compurgators shall be four, and so on, the compurgators being double the number of the secta, until the secta shall amount to six, when it will not be necessary for the compurgators to be double their number; but eleven will be sufficient; and the assertion in the Year-book before mentioned, that the tenant shall make his law de duodecima manu, that is to say, eleven and himself, is merely by counsel in argument. In an *anonymous case*, in 2 Ventr. 171, it is stated that less than eleven compurgators will do. In Style's Practical Register, p. 572, it is said of wager of law, "He that is to do it, must do it duodena manu, viz., he must bring six compurgators with him, the defendant then swears de fidelitate, the compurgators de credulitate." This species of defence is not often heard of now; but in *Barry v. Robinson*, 1 N. R. 297, the Court denied that a wager of law would now be disallowed.

ABBOTT, C. J. The Court will not give the defendant any assistance in this matter. He must bring such number of compurgators as he shall be advised are sufficient. If the plaintiff is not satisfied with the number brought, *the objection will be open to him, and then the Court will hear both sides. [*540]

Rule refused.

The defendant prepared to bring eleven compurgators, but the plaintiff abandoned the action.

HAWES and Another v. WATSON and Another.

A., by contract, sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt.; and on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, and rehouse the same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers and gave to C. a written acknowledgment that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order: Held, in an action of trover by C. against the wharfingers, that after their acknowledgment, they held the tallow as the agents of C., and that they could not therefore set up as a defence a right in A. to stop it in transitu.

TROVER for a quantity of tallow. Plea, not guilty. At the trial before ABBOTT, C. J., at the London sittings after Michaelmas term, the following facts were proved for the plaintiffs. The plaintiffs, on the 25th September, 1823, purchased by contract, of Messrs. Moberly and Bell, three hundred casks of tallow, at 40s. per cwt. On the 27th September, in part execution of their contract, Moberly and Bell sent to the plaintiffs the following transfer note, signed by the defendants, who were wharfingers. "Messrs. J. and B. Hawes, we have this day transferred to your account, (by virtue of an order from Messrs. Moberly and Bell) one hundred casks tallow, ex Matilda, with charges from October 10th, 1823, H. and M. one hundred casks." The plaintiffs then gave Moberly and Bell their acceptance for 2880*l.*, the price of the tallow, which was duly paid, and afterwards sold twenty-one casks of this tallow, which the defendants delivered, pursuant to their order. Moberly and Bell stopped payment on the 11th October, and on the 14th the *defendants received [*541] notice from Raikes and Co., the original vendors of the tallow, not to deliver the remaining casks to Moberly and Bell, or their order; and the defendants, in consequence, refused to deliver the remainder of the tallow to the plaintiffs, upon their demanding the same. On the part of the defendants it was proved, that Moberly and Bell, on the 26th of September, had purchased of

Raikes and Co. one hundred casks of tallow (the same that were afterwards sold to the plaintiffs) landed out of the Matilda, lying at Watson's wharf, at 2*l.* 1*s.* per cwt., to be paid for in money, allowing 2½ per cent. discount, and fourteen days for delivery; and on the same day Raikes and Co. gave a written order upon the defendants to weigh, deliver, transfer, or rehouse the tallow. Moberly and Bell had not paid for the same, nor had it been weighed subsequently to this order. Upon these facts it was contended at the trial, on the part of the defendants, that they were not bound to deliver to the plaintiffs the remaining seventy-nine casks of tallow, inasmuch as Raikes and Co. had, as between them and Moberly and Bell a right to stop them in transitu, the delivery to Moberly and Bell not being perfect, inasmuch as the tallow had not been weighed. The Lord chief justice, however, was of opinion, that whatever the question might be as between buyer and seller, the defendants having, by their note of the 27th of September, acknowledged that they held the tallow on account of the plaintiffs, could not now dispute their title; and the plaintiffs had a verdict.

The *Attorney-General* now moved for a new trial, upon the ground taken at the trial. *Hanson v. Meyer*, 6 East, 614, *is an authority to show, *542] that the absolute property in the tallow would not vest in Moberly and Bell, the first vendee, until it was weighed. The contract in that case was in terms similar to the contract made between the original vendors and Moberly and Bell. The weighing must precede the delivery, in order that the price may be ascertained. In that case, too, part of the goods had been weighed and delivered, yet it was held, that the vendor might retain the remainder, which continued unweighed in his possession; and *Shepley v. Davis*, 5 Taunt. 617, is also an authority to the same effect.

ABBOTT, C. J. The plaintiffs, in this case, paid their money upon the faith of the transfer note, signed by the defendants, by which they acknowledged that they held the tallow as their agents. If we were now to hold, that, notwithstanding that acknowledgment and that payment, the plaintiffs are not entitled to recover, we should enable the defendants to cause an innocent man to lose his money. To hold that the doctrine of stoppage in transitu applied to such a case as the present, would have the effect of putting an end to a very large portion of the commerce of the city of London.

BAYLEY, J. This appears to me very different from the ordinary case of vendor and vendee. In such cases, justice requires that the vendee shall not have the goods unless he pays the price. If he cannot pay the price, the vendor ought to have his goods back; but if the question arises, not between the original vendor and the original vendee, but between the original vendor *543] and a purchaser from the vendee, that purchaser having paid *the full price for the goods, what is the honesty and justice and equity of the case? Surely, that the vendee, who has paid the price, shall be entitled to the possession of the goods. I am of opinion, that when Messrs. Raikes and Co. signed the order to transfer, weigh, and deliver, that, according to the settled course and usage of trade, enabled Moberly and Bell to sell the goods again. There are many cases in which it has been held, that if the first vendor does any thing which can be considered as sanctioning the sale by his vendee, that destroys all right of the former to stop in transitu. *Stoveld v. Hughes*, 14 East, 308; *Harman v. Anderson*, 2 Campb. 243.

HOLROYD, J. I think that the note given by the defendant makes an end of the present question. When that note was given, the tallow became the property of the plaintiffs, and is to be considered from that time as kept by the defendants as the agents of the plaintiffs, and the latter were to be liable from the 10th October for all charges. This case is very different from that of *Hanson v. Meyer*. There, there was a sale of all the vendor's starch, (the quantity not being ascertained,) at 6*l.* per cwt. The order was to weigh and deliver all the vendor's starch, and a part having been weighed and delivered, but not

the residue, the main question before the Court was, whether the weighing and delivery of part did or did not in point of law operate as a transfer of the property as to the whole. The Court held, rightly, that it did not, because there the price of the whole which was to be paid for by bills could not be ascertained before it was weighed. The delivery of part, therefore, was not a delivery of the whole, *but the order was complied with only as to the part which was weighed and delivered, and the property in the residue [*544 remained unchanged until something further was done. It was not a delivery of part for the whole, and therefore it did not operate in law as a delivery of the whole so as to divest the vendor of his right to stop in transitu; but here, the wharfingers upon the receipt of the order directing them to weigh and deliver, sent an acknowledgment that they, the wharfingers, had transferred the goods to the vendees, and that they would be considered as subject to charges from a certain period. I think, therefore, that the wharfinger then held the tallow as the goods of the plaintiffs and as their agents, although there was not any actual weighing of them; and that the plaintiffs were then in possession by the defendants as their agents, they having acknowledged themselves as such by their note. For these reasons I am of opinion that the plaintiffs are entitled to recover.

BEST, J. I am also of opinion, that the acknowledgment which has been given in evidence puts an end to all question in this case. The very point has already been decided in the case of *Harman v. Anderson*, 2 Campb. 243. There the wharfinger had transferred the goods to the name of the vendee, and actually debited him with warehouse rent, but he having become insolvent, the sellers gave notice to the wharfingers to retain the goods; and upon an action of trover being brought against the wharfingers by the assignees of the vendee, it was contended that the sellers' right to stop in transitu *continued; [*545 but Lord ELLENBOROUGH said, "that the goods having been transferred into the name of the purchaser, it would shake the best established principles, still to allow a stoppage in transitu. From that moment the defendants became trustees for the purchaser, and there was an executed delivery, as much as if the goods had been delivered into his own hands. The payment of rent in these cases is a circumstance to show on whose account the goods are held; but it is immaterial here; the transfer in the books being of itself decisive." In the ensuing term, the then attorney-general (afterwards Lord C. J. GIBBS) expressed his acquiescence in the decision at *Nisi Prius*. In that case, indeed, it does not appear that, in order to ascertain the price, it was necessary to weigh the goods, but in a subsequent case of *Stonard v. Dunkin*, 2 Campb. 344, it was expressly held by Lord ELLENBOROUGH, that a warehouseman, who, on receiving an order from the seller of malt, to hold it on account of the purchaser, gave a written acknowledgment that he so held it, could not set up as a defence for not delivering it to the purchaser, that by the usage of trade, the property in malt sold was not transferred till it was *remeasured*, and that before the malt in question was remeasured, the seller became bankrupt; and there Lord ELLENBOROUGH says, "whatever the rule may be between the buyer and seller, it is clear the defendants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing, they attorned to him." It appears to me too, that if we consider the principle upon which the right of stoppage in transitu is founded, it cannot extend to *such a case as the [*546 present. The vendee has the legal right to the goods the moment the contract is executed, but there still exists in the vendor an equitable right to stop them in transitu, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons. Now it appears to me impossible, that it can be exercised in this case without disturbing the rights of third persons, for the property has not only been transferred to the purchaser in the books of the wharfingers, but there has been an acknowledgment by

them, that they hold it for the purchaser, who has paid the price of it. It has been said that there has been no change of property. If there has not, I do not see how there can be any until the tallow is actually melted down and converted into candles. If the argument on the part of the defendants be valid, the vendor, if he is not fully paid, has a right if the goods are not weighed, to stop in transitu, even though they have passed through the hands of a hundred different purchasers and been paid for by all except the first. It appears to me, that we should disturb an established principle if we held that this could be done in such a case as the present. I think the right of stoppage in transitu is an equitable right to be exercised by the vendor, only when it can be done without disturbing the rights of third persons. *Cumming v. Brown*, 9 East, 506. Here, that cannot be done, and therefore I think that Raikes and Co. had not any right to stop in transitu, and that the plaintiffs are therefore entitled to recover.

Rule discharged.

*547]

*JEE, Clerk, v. THURLOW.

By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds: *Held*, that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce a mensa et toro was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity.

DEBT on an indenture, made between defendant of the first part, his wife of the second part, and plaintiff, a trustee for the wife, of the third part, whereby, (after reciting that certain differences had then lately arisen and taken place between defendant and his wife, and that they had mutually agreed to live separate and apart,) defendant covenanted to pay his wife, during so much of her natural life as he should live, an annuity of 80*l.* a year. Breach, non-payment of one quarter's annuity. Plea first, craved oyer of the deed, whereby it appeared that the defendant covenanted not to sue his wife for restitution of conjugal rights, and that she had agreed to accept the said annuity for her support, to leave their children under the sole control of defendant, without any interference by her, and that if defendant paid any debts for her, he should be at liberty to deduct the amount out of the annuity. And plaintiff, on behalf of the wife, covenanted that she should release and give up all claim of jointure, dower, or thirds, and that he would indemnify defendant against all her debts. The plea then averred, that after the making of the indenture, the wife instituted, in the Consistory Court of the lord bishop of London, a cause against defendant for restitution of conjugal rights; in which cause defendant caused to be given in, and admitted an allegation and exhibits, charging his wife with certain acts of adultery; and that *such proceedings were thereupon had in the
*548] Consistory Court in the said cause, that by a decree of that court, made in the said cause, defendant and his wife were divorced from bed and board; and concluded with a verification. Demurrer and rejoinder.

Chitty, in support of the demurrer. The plea in this case is certainly bad. In the first place, the covenant is absolute to pay during the life of the defendant, and is not qualified to pay, only so long as the parties should live separate, or as long as the wife should continue chaste. It will perhaps be urged that this is analogous to a demand of dower, which is forfeited by adultery, and that this action is barred by the decree of the Ecclesiastical Court. But dower is, under such circumstances, forfeited by the express words of an act of parliament. Westm. 2, c. 34. Nor can the decree alluded to be well pleaded as a bar in this court. In *Sidney v. Sidney*, 3 P. W. 269, it was held that adultery

was no bar to a claim of the specific performance of marriage articles; and in *Field v. Serres*, 1 N. Rep. 121, the court of C. P. refused to allow the defendant, in such an action as the present, to withdraw the general issue and plead the adultery of the wife, because it would be no answer to the action. The principal question is, whether such deeds as the present can be in any event supported. With the exception of *Titley v. Durand*, 7 Price, 577, there is no case upon which an argument against them can be founded; and although the present lord chancellor, in *St. John v. St. John*, 11 Ves. 526, has said that, if it were *res integra*, the question would *be worthy of great consideration, [*549 yet he has upheld the former decisions. Such were *Lord Rodney v. Chambers*, 2 East, 283, and *Guth v. Guth*, 3 Br. C. C. 614. In *Worrall v. Jacob*, 3 Mer. 256, Sir W. Grant, then master of the rolls, treated it as settled law, that such deeds were valid; and in *Stuart v. Kirkwall*, 3 Madd. 387, effect was given to such an arrangement; for it was there held that a married woman, separated from her husband, and having a separate maintenance, might render that liable by accepting a bill of exchange. The reasons for the judgment in *Titley v. Durand* do not appear; but that case is essentially different from the present, inasmuch as the deed provided for the future separation of the husband and wife, at the mere discretion of the latter, without requiring the consent or approbation of trustees, as in *Lord Rodney v. Chambers*.

Patteson, contra. The plea is a sufficient answer to the action. By the deed, as set out on oyer, it appears that the defendant covenanted not to sue his wife for restitution of conjugal rights. It is true, that the wife did not expressly enter into any such covenant; but her covenant to leave the children under his sole management is in effect the same, for she cannot sue for restitution of conjugal rights without breaking that covenant. She, therefore, by proceeding in the Ecclesiastical Court, took the first step towards destroying the deed. This must be considered as an action by the wife; any matter of defence against the *cestui que trust* is also a defence against the trustee. Had the wife succeeded in that *suit, the deed would have been vacated; and she would have succeeded but for the allegation of adultery there set up as a defence. [*550 Now it would be somewhat singular if the situation of the wife were to be better in this court, on account of a charge of adultery having been proved against her in another. That a deed of separation is at an end if the parties come together again, is proved by *Bateman v. Ross*, 1 Dow. P. C. 245; *St. John v. St. John*, 11 Ves. 537, and *Fletcher v. Fletcher*, 2 Cox, 99; 3 Br. C. C. 618, n. S. C. *Gawden v. Draper*, 2 Ventr. 217, which at first sight appears to warrant a different opinion, turned entirely upon the pleadings. [BAYLEY, J. Nothing appears on the record which can warrant this Court in saying that adultery has been committed. The ecclesiastical courts proceeded upon evidence of which we cannot take notice.] It has certainly been held, that adultery would not be a good plea to such an action as the present, but this plea goes further, and shows a judgment on the point by a court of competent jurisdiction. But, whether the plea be good or bad, the action cannot be maintained, for the deed itself is illegal and void. Several cases have been cited, in which the validity of deeds of separation was recognised; but many high authorities have expressed great doubts upon the subject, and have shaken the former decisions. *St. John v. St. John*; *Mildmay v. Mildmay*, 1 Vern. 53. In *Titley v. Durand*, it was held, that deeds providing for future separation were void, and it would not be difficult to show, that all the arguments apply equally to provisions for present separation. It would, however, be useless to enter upon a discussion of that point, unless the Court *feel themselves [*551 at liberty to decide in favour of this defendant, notwithstanding the cases in the books, if they shall be satisfied of the impolicy and impropriety of such contracts.

ABBOTT, C. J. The judges who decided the case of *Titley v. Durand* did

not intend to shake any former decision. They thought it different from all the former cases, inasmuch as the deed provided for future separations of the husband and wife, who, at the time of making the deed, were living together. For a long series of years, all the judges, when called upon to pronounce judgment in such cases, have felt themselves bound by former decisions, although each of them in his turn has said, that his opinion would probably have been different, had the question been *res integra*. In *St. John v. St. John*, the lord chancellor says, "If this were *res integra* untouched by dictum or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this court. But if dicta have followed dicta, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject." That opinion is a fit guide for us. Ought not we to say, that if a new decision is to overturn all the former cases on this question, it must be the decision of that high tribunal which is competent to give the law to all other tribunals, and rectify their errors, whenever called upon to review them. For these reasons, I cannot, sitting in this place, say that the deed is void. The

*552] only question then is upon the sufficiency of the plea. It has been decided, that a plea stating the commission of adultery by the wife is not sufficient, upon this ground, that if the husband, when executing such a deed as this, thinks proper to enter into an unqualified covenant, he must be bound by it. Had he wished to make the non-commission of adultery a condition of paying the annuity to his wife, he should have covenanted to pay it *quamdiu casta vixerit*. A plea of a judgment in the Ecclesiastical Court, but not alleging the fact of adultery, is not at all more favourable for the defendant; our judgment must, therefore, be for the plaintiff.

BAYLEY, J. There is a very plain distinction between this case and *Titley v. Durand*. There the contract provided for future separation at the will of the wife; it was offering a premium to her for leaving her husband. In *Lord Rodney v. Chambers*, that objection did not apply, for the intervention of impartial persons was there required, to decide whether sufficient cause of separation did or did not exist. As to the general question, I am of opinion, that as it has for so long a period of time been the system of jurisprudence to hold such deeds valid, it is not for this Court to entertain the question that has been proposed. If any alteration is to be made in the law as now understood, it must be by a decision of the House of Lords, or by an act of the legislature. Is the plea then an answer to the action? It is admitted, that a plea alleging the fact of adultery would not be sufficient; neither is the decree of a spiritual court an answer; for it proceeds upon evidence which, in this court, would not be deemed satisfactory. We cannot, therefore, even act upon the supposition

*553] that adultery has been committed. That being so, the plea is insufficient, and the plaintiff is entitled to our judgment.

HOLROYD, J. This is a covenant made to provide for a separation which had been determined upon before the execution of the deed, and is for the payment of an annuity during the wife's life, if the husband should so long live. It is founded upon what the law considers a good consideration; for there is a covenant by the trustee to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, or thirds.^(a) It is conceded, that adultery would not be a forfeiture of an annuity so granted. That a jointure would not be thereby forfeited is shown by *Sidney v. Sidney*, 3 P Wms. 269, which was confirmed by *Seagrave v. Seagrave*, 13 Ves. 439, where the question arose on a bond containing provisions very similar to those in the deed in question. But it has been argued, that the wife, by suing for restitution of conjugal rights, has done an act inconsistent with the deed, and that the cove-

^(a) See *Compton v. Collinson*, 2 Br. C. C. 377; *Stevens v. Olive*, Ib. 90, and *Rex v. Brewer*, Ib. 93, n.

nant is thereby destroyed, as much as if they had come together again. It is to be observed, that the covenant is not limited to the period of separation. But if it is to receive that construction, that is only upon the ground that the wife, when reunited to her husband, would be maintained by him, and therefore it does not follow that the deed is avoided by an unavailing attempt to obtain restitution. The case then resolves itself into the general question, whether a covenant is *binding which provides for a separation between husband and wife, already determined upon, and not for a future separation at the mere will of either of them. The language of the lord chancellor in *St. John v. St. John* is binding upon us. We cannot do otherwise than abide by those decisions which have from time to time been made both in courts of law and equity; particularly where the covenant to pay the annuity is founded upon engagements on the part of the trustees which are in case of the husband; which distinction, in favour of such deeds as the present, is noticed by the master of the rolls in *Worrall v. Jacob*. [*554]

BEST, J. It seems that the plea in this case is not offered as an answer to the action, so much on the ground of the deed being vacated by adultery in the wife, as on the idea of her having put an end to the articles, providing for her separate maintenance, by suing for restitution of conjugal rights. I can well understand what was said in *Bateman v. Ross*, because there the wife would have had a maintenance by living again with her husband. But here the husband opposed the attempt made by the wife, who, in consequence of that opposition, is still in need of the maintenance which it was the object of the deed to provide. As to the other point I entertain no doubt. Whatever opinions judges may have entertained as to the policy or impolicy of such contracts as this, it would be a strong measure for us, on the mere ground of policy, to overthrow former decisions, when Lord ELDON, sitting in the House of Lords, did not feel himself strong enough to do so. In the case of *Bateman v. Ross*, he must have advised the lords *to decree in favour of the articles, for it appears that they were established, sufficient proof of the fact of reconciliation not having been given. [*555]

Judgment for the plaintiff.

HULKE v. PICKERING.

Judgment cannot be entered upon a warrant of attorney more than twenty years old, without an affidavit stating facts which rebut the presumption of payment.

A RULE nisi was obtained to enter up judgment on a warrant of attorney more than twenty years old. The affidavit did not state any circumstances tending to prove that the money remained unpaid.

F. Pollock showed cause, and contended, that, after the lapse of twenty years, the presumption of payment applied to warrants of attorney as well as other securities, and that some facts should have been stated to rebut that presumption.

Abraham, contra. None of the books of practice contain any form of affidavit to be used on such occasions, setting out circumstances to negative the presumption of satisfaction. If any answer to the claim can be given, that should come from the other side.

Per Curiam. We think that in this as in other cases, the plaintiff should, after the lapse of so long a period, state some facts to show that the warrant of attorney has not been satisfied.

The plaintiff accordingly producing such an affidavit, and the rule was made Absolute.

*556] *BISHOP and Another v. MACINTOSH and Another.

The 43 G. 3, c. 56, s. 2, prohibits the conveying in any ship, from any place in the United Kingdom, a greater number of persons than in the proportion of one person for every two tons of the burden of the ship, and every such ship is to be deemed to be of the burden described in the certificate of registry; and if any ship is partly laden with goods the master is prohibited from taking on board a greater number of persons than in the proportion of one person for every two tons of that part of the ship remaining unladen: *Held*, under this act, that vessels partly laden with goods were to be deemed of the burden described in the certificate of registry.

ASSUMPSIT, in consideration that plaintiffs had sold and delivered to defendants ship's stores, and had also effected a policy of insurance on the ship *Hope*, on a voyage from England to New South Wales, for 332*l.*, to be received by plaintiffs in New South Wales, at the termination of the voyage; the defendants undertook that they, unless prevented therefrom by inevitable accident, would cause the voyage to be performed, and the money to be paid to the plaintiffs at New South Wales within a reasonable time. Breach, that the defendants did not, although not prevented therefrom by inevitable accident, cause the voyage to be performed, or the money to be paid within a reasonable time. Plea, general issue. At the trial before ABBOTT, C. J., at the Middlesex sittings after Michaelmas term, it appeared, that the defendants were the owners of the ship *Hope*, which in the certificate of registry, was stated to be of the burden of two hundred and thirty tons, and that she sailed from London on her voyage to New South Wales with a cargo, and having ninety passengers on board and a crew of seventeen men, including the master, and that she was detained at Ramsgate by the officers of the customs, on the ground that she had a greater number of passengers on board than was allowed by law. The defendants contended that she had no more than that number, that the seizure was unlawful, and that they were there-

*557] fore prevented by inevitable accident from performing the *voyage. The question turned on the stat. 53 G. 3, c. 56, s. 2, by which it was enacted, that it should not be lawful to convey from any place in the United Kingdom to any parts beyond sea in any ship, a greater number of persons, whether adults or children, including the crew, than in the proportion of one person for every two tons of the burden of such ship or vessel; and every such ship or vessel should be deemed and taken to be of such tonnage and burden as is described and set forth in the respective certificate of the registry of each and every such ship; and if any such ship or vessel should be partly laden with goods, wares, or merchandise, then it should not be lawful for the master to receive or take on board a greater number of persons including the crew, than in the proportion of one person for every two tons of that part of such ship or vessel remaining unladen; and such goods, wares, and merchandise should, at the sight and under the direction of the collector or comptroller, or other officer of the customs, at the port or place where such goods, wares, or merchandise should be taken on board, be stowed and disposed of in such manner as to leave good, sufficient, and wholesome accommodation for the proportion of persons thereby allowed in such case to be received on board." A verdict having been found for the plaintiffs, it being admitted, that if the vessel was to be taken as of the burden described in the register, there were more passengers than the law allowed, it now appeared by affidavit, that although the tonnage mentioned in the register was two hundred and thirty, yet that, in point of fact, the vessel measured two hundred and sixty-nine, and that the cargo was stowed in the hold, and not between decks.

*558] The *Attorney-General* now moved for a new trial, and contended, that although with respect to every vessel not carrying a cargo, the tonnage was to be taken to be that described in the certificate of registry, yet that, with respect to vessels partly laden with goods, the actual tonnage was to be considered; but

The Court were clearly of opinion, that the sound construction of the act was, that all vessels, whether partly laden or not, should be deemed to be of the burden mentioned in the certificate of registry.

Rule refused.

MOODY v. KING and PORTER.

A. and B. having been in partnership dissolved it on the 14th July, the dissolution was advertised on the 17th, on the 16th a bill was drawn in the names of A. and B. which was accepted and paid by C. without consideration; C. afterwards sued A. and B. for money lent; A. pleaded bankruptcy and certificate, B. non-assumpsit, nol. pros. as to A.: *Held*, that he was a competent witness for B. to prove that C. accepted the bill for his (A.'s) accommodation, and not for that of B., for that B. was only a surety, and might have proved under B.'s commission.

ASSUMPSIT for money lent, &c., on the usual money counts. Plea, by King, non-assumpsit, by Porter, bankruptcy and certificate, nol. pros. as to him. At the trial before ABBOTT, C. J., at the Westminster sittings after last Michaelmas term, it appeared that the plaintiff had accepted an accommodation bill drawn in the names of the two defendants, which he afterwards paid. The defendants had been in partnership for some years, but separated on the 14th of July, 1821. The bill in question was drawn on the 16th, and the dissolution of the partnership appeared in the Gazette on the 17th of the same month. Porter became bankrupt in February, 1822. For the defendant King, it was proposed to examine Porter, to prove that the bill was accepted for his accommodation alone, and not for that of King. It was objected that Porter was [*559] not a competent witness, because if the plaintiff recovered in this action, he (Porter) would be liable to King. The lord chief justice overruled the objection, and the defendant obtained a verdict.

Scarlett now moved to enter a verdict for the plaintiff, and contended, that as this was a partnership transaction between King and Porter, the former could not prove under the commission against Porter until the bill was paid, and therefore his demand was not barred by the certificate. It is true, that where one person lends his name to a bill for another, he is within the meaning of the 49 G. 3, c. 121, s. 8; *Ex parte Young*, 2 Rose, 40; but here, King was not a surety, for he and Porter were joint debtors, and his demand against Porter would not arise until the bill was paid.

ABBOTT, C. J. The partnership which had before subsisted between King and Porter, was as between them dissolved on the 14th July, 1821, and the bill was not accepted till the 16th of the same month. It was not, therefore, as between them a partnership transaction, and King was only a surety for Porter. The debt might, therefore, have been proved, and King's claim was barred by the certificate.

Rule refused

*SKAIFE, Assignee of W. ALLAN, a Bankrupt, v. HOWARD. [*560]

In an action for goods sold and delivered, brought by the assignees of A., against whom a commission of bankruptcy issued, on the petition of certain persons, who alleged that a debt was due to them as assignees of B., a bankrupt: *Held*, that the petitioning creditor's debt was sufficiently proved by the production of the proceedings under the commission, (no notice of an intention to dispute it having been given) and that it was not incumbent on the plaintiffs to give any other evidence that the petitioning creditors were the assignees of B.

ASSUMPSIT for goods sold by the bankrupt to the defendant. Plea, non-assumpsit. At the trial before ABBOTT, C. J., at the London sittings after last term, the proceedings under the commission were produced to prove the petitioning creditor's debt, act of bankruptcy, and trading; and it appeared, that the commission issued on the petition of the assignees of one Miller, a bank-

rupt; and that there was a debt of 147*l.* due to them as assignees. It was contended at the trial, that some evidence should be given to show that the parties who presented the petition, and to whom the debt was alleged to be due, were the assignees of Miller. The 49 G. 3. c. 121, enacted, that the commission and the proceedings under it are to be received as evidence of the petitioning creditor's debt, &c. Here the debt was due to the parties as assignees; the proceedings were not made evidence of the fact, that the parties stating themselves to be assignees of Miller actually were so. That ought to have been made out by proof of the assignment from the commissioners. The statute only dispenses with the necessity of proving by parol evidence the existence of a debt, &c. *Abbott v. Plumbe*, Doug. 216; *Doe v. Liston*, 4 Taunt. 741. Before the statute, if the petitioning creditor were an executor, the probate must have been produced. Or if he was the assignee of "another bankrupt," who was the creditor of the bankrupt in the particular case, there must have been proof of the trading and bankruptcy of both these persons, *Doe v. Liston*, 4 Taunt. 741. The lord chief justice was of opinion, that the proceedings were sufficient evidence of a good petitioning creditor's debt due to the parties in the character which they appeared to have claimed; and a verdict was found for the plaintiff.

Marryat now moved for a new trial upon the ground already stated.

ABBOTT, C. J. This clause of the act of parliament is remedial, the object being to relieve the assignees of a bankrupt from the necessity of going through the proof of all the things necessary to support a commission of bankruptcy. The production of the proceedings is not a proof binding upon any party, because, by giving notice, he may call for other proof; but in the absence of any such notice they must be received as proof of all the matters contained in them. I agree that if the proceedings, when produced, do not contain facts sufficient to sustain the bankruptcy, they will not of themselves be sufficient; but I am not aware of any case where, if the facts stated on the deposition are sufficient of themselves to sustain the bankruptcy, any further proof has been required. It has been said that the statute only dispenses with parol evidence of the petitioning creditor's debt, but that is not so; for before the statute, a petitioning creditor would not have been a competent witness to support the commission in an action by the assignees of a bankrupt, but since the "statute, where no notice is given, the petitioning creditor's debt has been held to be sufficiently proved by his own deposition before the commissioners, *Bisse v. Randall*, 2 Camp. 493, so that the statute has made depositions evidence in a case where parol evidence of the fact deposed to by the same person would not have been admissible. I think that we ought to give full effect to the provisions of this statute, and to hold, that the depositions are evidence of a debt due to the party in that character in which he appears to have claimed it. If it had appeared that the debt was due to the petitioning creditor, as executor, it would not have been necessary to produce the probate in order to prove that he was executor. I think, therefore, that the depositions must be taken for proof of the petitioning creditor's debt, &c., in all cases where the facts deposed to, if proved by other means, would support the commission.

A rule was afterwards granted upon another ground, disclosed by affidavit.

AARON v. CHAUNDY.

In *assumpsit* on a promissory note, defendant pleaded non *assumpsit*, and having made up the issue, ruled plaintiff to enter it, who, by mistake, entered a plea of not guilty. Defendant signed judgment of non. proa.: *Held*, that the plea entered was substantially the same as the other, and the judgment was set aside.

ASSUMPSIT on a promissory note. Plea, non *assumpsit*. Defendant made up the issue, and ruled the plaintiff to enter it. He entered it by mistake with

a plea of not guilty, whereupon the defendant *signed judgment of non. pros. *Adolphus* having obtained a rule to set aside the judgment, [*563]

Campbell showed cause, and contended, that the judgment was regular. The plaintiff never entered the issue joined in this action, the defendant was therefore entitled to sign judgment. *Wood v. Miller*, 3 East, 204.

Per Curiam. That case was very different; the objection there was, that the issue was entered as of a wrong term. The plea of not guilty in such a case as the present is substantially the same as non-assumpsit. The rule must, therefore, be absolute; but we think that it should be without costs.

Rule absolute, without costs.

COLLINS v. GOODYER.

The true place of abode of the deponent, as well as his addition, must be inserted in an affidavit to hold to bail.

THE defendant was arrested and holden to bail on an affidavit made by the plaintiff, in which he described himself as of Dorset Place, Clapham Road, Middlesex.

Platt obtained a rule to show cause why the bail bond should not be given up to be cancelled and a common appearance entered, on an affidavit that the plaintiff's residence was in fact Dorset Place, Clapham Road, Surrey.

**Andrews* showed cause, and contended that the defendant had not [*564] been misled, or in any way prejudiced by the mistake.

Per Curiam. A rule of this court, Mich. 15, Car. 2, requires that the true place of abode and true addition of every person who shall make affidavit here, shall be inserted in such affidavit. That is binding upon us, and we must make this rule absolute.

Rule absolute. (a)

(a) See *Jarrett v. Dillon*, 1 East, 18; *D'Argent v. Vivian*, Ib. 330; *Vaissier v. Alderson*, 3 M. & S. 165; *Polleri v. De Souza*, 4 Taunt. 154.

SOAMES and Another v. LONERGAN and Another.

Where the charterers of a ship for a voyage from C. to St. B., and thence to G. to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from G., with a proviso, that in the event of the non-arrival of the first-mentioned ship at G., then the second charter should be void: *Held*, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not being attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her.

ASSUMPSIT on a charter-party of affreightment made between the plaintiffs, owners of the *St. Patrick*, and the defendants. The first count alleged, that the plaintiffs thereby agreed that the *St. Patrick* should sail from the port of London in ballast to Cadiz, remain there fifteen days, and then proceed to Guayaquil, and, if required, to such one other port on the west coast of South America as the said freighters or their agents might think proper and direct; and that in such case she should, in the first place, proceed to such other port, and subsequently to Guayaquil. And being arrived at *such destined port or ports, [*565] should receive and take on board from the agents of the freighters all such lawful goods or merchandise as they might think proper, up to a full cargo; and having received such cargo, should proceed therewith to some port in Spain, England, or the continent of Europe, as the said freighters or their agents might direct. That the said ship should, if required, lay at her destined port or ports for the purpose of receiving the said cargo on board, and at her destined port of discharge for unloading the same, one hundred and twenty run

ning days in the whole, to commence and be accounted from the day the said ship should arrive at her first destined port of loading, being admitted to pratique and ready to receive goods on board, to cease when despatched therefrom, recommence on her arrival at her second port of loading, if ordered to more than one, being admitted to pratique and ready to receive goods on board there, cease again when despatched therefrom, and recommence on her arrival at her destined port of discharge, being also admitted to pratique and ready to deliver the said cargo. And the defendants agreed that they would, within fifteen days after the arrival of the said ship at Cadiz, despatch her to Guayaquil, or previously to some one safe port on the west coast of South America, and should and would send alongside the said ship, at such port or ports, all such lawful goods as they might think proper to ship, and despatch her to some one port either in Spain, England, or the continent of Europe, and there receive such cargo from alongside the said ship within the one hundred and twenty lay days thereinbefore limited for the purposes aforesaid, or within the days of demurrage thereafter mentioned; and would pay 6000*l.* in full for the freight. The

*566] declaration then averred *the arrival of the ship at Cadiz; that she was ordered to Lima, and arrived there on the 28th March, 1821; that the commander gave notice thereof, and offered to receive a cargo on board. Breach, that the defendants did not send alongside the vessel at Lima or Guayaquil, or any other port or ports on the west side of South America, or elsewhere, any goods, or supply any cargo, or despatch her to any port in Spain, England, or the continent of Europe. The second count set out the charter-party as before, and also a stipulation, that the vessel might be detained twenty days on demurrage, and the following proviso: "Provided always, and it was thereby understood and agreed by and between the said parties, that in the event of the non-arrival of the ship or vessel called the Grant, Hogarth, master, chartered and then on her voyage to St Blas de California, at that port; then in such case that charter-party, and every clause and agreement therein contained should, in case no shipment should have been made under it, cease, determine, and be utterly void to all intents and purposes whatsoever." In addition to the averments in the first count this stated also that the Grant did arrive at St. Blas according to the tenor and effect of the charter-party. The third count stated, that a certain other charter-party was made between the plaintiffs and defendants in the same words and figures, and to the same purport and effect as that mentioned in the second count. It then alleged mutual promises, and that, in consideration of the premises, it was agreed by and between the plaintiffs and defendants, that the clause for annulling the contract in the event of the non-arrival of the Grant at St. Blas, should be extended to the event of

*567] the non-arrival of that ship at Guayaquil *from St. Blas. Averment, that the Grant did arrive at Guayaquil from St. Blas, and then as the first count. The fourth count, after the same introduction as in the third, alleged a promise by defendants to use reasonable diligence on their part, so that the charter-party might not be avoided by the non-arrival of the Grant at St. Blas. Breach, that they did not use reasonable diligence, and that through their negligence and default the Grant did not arrive at St. Blas. Fifth count alleged the substitution of Guayaquil for St. Blas, and a promise to use diligence that the Grant might arrive there. Breach as in fourth count. Various common counts were added. Plea, the general issue. At the trial before ABBOTT, C. J., at the London sittings after last Trinity term, it appeared that a charter-party, in substance the same as that set out in the second count, was made by and between the plaintiffs and defendants; and that, afterwards, the proviso was extended to the non-arrival of the Grant at Guayaquil from St. Blas as alleged in the third count. The Grant was chartered by Barron and M'Pherson, merchants at Cadiz, on whose account also the charter-party of the St. Patrick was entered into by the defendants. In pursuance of that charter-party, the St. Patrick

sailed from London in October, 1820, and arrived at Cadiz, on the 15th of November following. Before the *St. Patrick* sailed from Cadiz, the captain, for himself and his owners, entered into another charter-party with Don Juan A. de Arambura, a merchant at Cadiz, to bring home a cargo from South America, subject to this proviso: "That in the event of the arrival of the *Grant*, then on her voyage to Guayaquil at that port, then that charter-party, and every clause and agreement therein *contained, should, in case no shipment should have been made under it, cease, determine, and be utterly void, to all intents and purposes whatsoever." Barron and M'Pherson ordered the *St. Patrick* to proceed to Lima, for which place she sailed on the 10th of December, 1820, and arrived there March 28th, 1821, and on 30th, the captain gave notice of his arrival to the Don Yzcue, the correspondent of Barron and M'Pherson. The *St. Patrick* remained at Lima until July 21st, when the lay days, stipulated for in the charter, expired, and she was not after that time employed by the defendants or B. and M. under the charter-party. The *St. Patrick* was not despatched to Guayaquil by Don Yzcue, or any person at Lima on behalf of the charterers, nor was any homeward cargo furnished for her. The ship *Grant*, in the proviso mentioned, arrived at St. Blas, March 5th, 1821, sailed thence for Guayaquil, June 5th, 1821, and arrived there October 19th, in the same year. On the 10th November following the captain made a protest, giving some account of the delay of his arrival, but not making any complaint that it had been caused by the freighters. The *St. Patrick* remained at Lima after the 21st of July, for the purpose of taking in a cargo, under the conditional charter. On the 24th of July she was taken possession of by the forces under Lord Cochrane, and liberated on the 28d of August, and afterwards took in some cargo and one hundred and thirty passengers for Cadiz, and was despatched therewith on the 12th of November, and sailed on the 15th, and after touching at Rio Janeiro, arrived at Cadiz, April 20th, 1822. The lord chief justice told the jury, that in his opinion the arrival of the *Grant*, mentioned in the proviso, meant, an arrival in time for the object of the charter of the *St. Patrick*, and that *unless they thought that the arrival of the *Grant* had been improperly prevented by the defendants, or by Barron and M'Pherson, they should find a verdict for the defendants. The jury having found a verdict for the defendants, the attorney-general, in Michaelmas term, obtained a rule nisi for a new trial, on the grounds that the proviso in the charter of the *St. Patrick* was satisfied by the arrival of the *Grant* at Guayaquil at any time during her then voyage, and also, that it ought to have been presumed that she had been delayed improperly by the defendants, or Barron and M'Pherson. [*569]

Scarlett and *F. Pollock* showed cause. The return cargo of the *St. Patrick* was to be bought with the proceeds of the cargo carried out by the *Grant*. The arrival of the *Grant* at Guayaquil was the very condition on which this charter-party was made; that condition must necessarily have had reference to the arrival of the *Grant* within the scope of the voyage on which the *St. Patrick* was engaged, or it would be utterly useless and absurd. According to the construction contended for on the other side, the arrival of the *Grant* at any time would have been sufficient. If, indeed, the delay of the *Grant* could be attributed to the freighters of the *St. Patrick*, that might alter the case; but the jury have expressly found, that the freighters were not in fault. If the latter vessel, instead of remaining at Lima, had gone to Guayaquil, the captain would not have been bound to remain there more than one hundred and twenty days; and, therefore, unless the *Grant* arrived there within that time, or such further time as the captain thought proper to wait, the charter of the *St. Patrick* was made void by the proviso; and therefore the circumstance of the *St. Patrick* not *being despatched to Guayaquil by the agent of the freighters, cannot affect the present question. [*570]

The *Attorney-General* and *Campbell*, contra. Unless the lord chief justice

was right in deciding, as a question of law, that the condition of the *St. Patrick's* charter was not satisfied, unless the *Grant* arrived in time for the purposes of the *St. Patrick's* voyage, the plaintiffs must have a new trial. Now it cannot be disputed, that the condition would have been satisfied had the *Grant* arrived at Guayaquil on the one hundred and nineteenth day, and yet that could not have been of any service to the freighters of the *St. Patrick*, which vessel was then at Lima. The construction put upon this instrument cannot, therefore, be correct. Looking at the instrument itself, no line can be drawn, except the arrival of the *Grant* in the course of her then voyage. She did arrive in the course of that voyage, and thereby satisfied the proviso in the charter of the *St. Patrick*. The object of the voyage of the latter vessel cannot be taken into consideration in construing the charter-party, wherein it is not mentioned.

ABBOTT, C. J. I am of opinion that there ought not to be a new trial in this case. I left it to the jury to say whether the delay of the *Grant* had been occasioned by the default of the defendants; and observed that, if it had, her non-arrival would not be a sufficient answer to the action. They thought that the defendants had not occasioned it. The next point is the construction of the charter-party; and if my opinion upon that was erroneous, the plaintiffs must have a new trial. My opinion was, that it meant such an arrival of the *Grant* *571] "as would answer the purposes of the parties to the charter-party. It is said that the only limit is arrival in the course of that voyage; but that might be so late as not to answer the purposes plainly designated by this instrument. Looking at that instrument alone, I still think as before, that the arrival of the *Grant*, in order to satisfy the proviso, should have been within the one hundred and twenty running days, or the twenty additional days, during which the ship might be detained on demurrage, if the captain was required to wait so long.

BAYLEY, J. This case turns chiefly, if not entirely, upon the meaning of the term "non-arrival." It may have an indefinite meaning; then it would be a mere wagering bargain between the parties; but it may also mean non-arrival within such time as may answer the purposes of the *St. Patrick's* voyage. The latter is, I think, the correct construction; and then, in order to satisfy the proviso, the arrival should have been within the stipulated running days, or such further period as the captain of the *St. Patrick* chose to remain on the coast; for, in the latter event, it would have been an arrival available to the freighters of that ship. If the term "non-arrival" is to be construed indefinitely, it would be totally unconnected with the purposes of the charter-party on which this action is brought, and there could have been no reason for inserting it. But in all probability the parties contemplated such an arrival of the *Grant* as would be subservient to the purposes of the freighters of the *St. Patrick*, and in default of such arrival this charter-party might be altogether useless to them. It is probable that both parties thought the *Grant* would arrive before the *St. Patrick* *572] If the *Grant* had not arrived within the one hundred and forty days allowed for running days and demurrage, the captain of the *St. Patrick* might still have waited, and I think that, if he had, the arrival of the *Grant* during such stay would have satisfied the proviso, and have entitled the owners to claim the freight agreed for by the charter-party.

BEST, J.(a) I am of opinion that there is not any ground for disturbing the verdict in this case. The jury have found that the delay of the *Grant* was not attributable to the defendants. The remaining question depends upon the construction of the charter-party. It appears to me that the conduct of the plaintiffs has put an end to their claim. I agree that, if the *St. Patrick* had waited until the arrival of the *Grant*, the owners would have had a right to insist upon her being laden with a cargo for the homeward voyage. It may be true, that the voyage spoken of in the proviso was the voyage on which the *Grant* was

(a) Holroyd, J., was in the *Bail Court*.

then proceeding. It is also true that she did arrive at Guayaquil in that voyage, but before her arrival, the captain of the St. Patrick had put it out of his power to fulfil the objects of the charterers. It has been argued that they were bound to load her within one hundred and twenty days, and certainly there is a stipulation to that effect in one part of the charter; but that is altogether inapplicable to the proviso, for until the arrival of the Grant, it could not be known whether that instrument would or would not be void. Now before the Grant arrived, the captain of the St. Patrick had made a new bargain, and had abandoned the *original contract; the defendants, therefore, were not bound to provide a return cargo, and consequently the plaintiffs have no right [573 to recover in this action.

Rule discharged.

AMORY and Another v. MERYWEATHER.

Debt on bond, conditioned for the payment of money by instalments. Plea, that defendant, by W., as his agent, made unlawful contracts for buying and selling shares in the public stocks; that these contracts were not specifically performed, but that W., as the agent of the defendant, voluntarily paid 500*l.* for differences against the form of the statute, and that for securing the repayment of that money to W., the defendant gave his promissory note to W., and that long after the same became due, W. endorsed it to the plaintiffs, and that the plaintiffs afterwards threatened to commence an action upon the note against the defendant; and the defendant, in fear of the action, did, at the request of the plaintiffs, give the bond in question, which the plaintiffs accepted in lieu of the promissory note, and the money secured thereby, they well knowing that the note had been made by the defendant on the occasion, and for the purpose in the plea mentioned: *Held*, that this plea was an answer to the action, inasmuch as the plaintiffs took the promissory note after it was due, and had notice of the illegality of the original consideration before the bond was given.

At the trial, it appeared in evidence that the note was given to W. to cover a sum which he, as broker, was to pay for losses on stockjobbing transactions: *Held*, that this evidence did not support the plea which stated that the note was given to secure the repayment of money actually paid by W.

DEBT on bond, bearing date the 13th May, 1822, for 1000*l.* Plea, first, (after cravingoyer of the bond and condition which was for the payment of 500*l.* by two instalments, the first of which became payable on the 13th May, 1823.) non est factum. Secondly, that on the 18th May, 1817, the defendant, by M. White, as the agent and on the behalf of the defendant, made and entered into divers, to wit, one hundred unlawful contracts and agreements with persons to the defendant unknown, for the buying and selling of shares in a public stock or security of this realm to the amount of 10,000*l.* three per cents., to wit, at, &c. Averment, that the contracts were not specifically performed, but that afterwards, to wit, on, &c., at, &c., he, the said M. White, did, as the agent and on the behalf of the defendant, voluntarily pay and give the sum of 500*l.* to the said *persons, with whom the said contracts had been made, for satisfying the respective differences for the not performing by the defendant of [574 the said contracts, contrary to the form of the statute, and thereupon for securing the repayment to White of 499*l.* 10*s.*, parcel of the sum of 500*l.* so voluntarily paid by M. White, and for no other purpose; defendant, on, &c., at, &c., at the request of White, made his promissory note, and thereby promised to pay three months after date to White or order 499*l.* 10*s.* That White endorsed the note to the plaintiffs, they knowing that it had been made by the defendant, on the occasion and for the purpose aforesaid; that after the note became due, the plaintiffs threatened to commence an action upon the note against the defendant, and thereupon the defendant gave the bond in lieu of the note and the money secured thereby. The third plea stated the making of the unlawful contracts, and that White paid 500*l.* for differences, and that for securing the repayment thereof to White defendant gave his promissory note, and then proceeded as follows: "that before the payment of the note, and long after the same had become due and payable, according to the tenor and effect thereof, to

wit, on the 1st of January, 1820, White endorsed the note to the plaintiffs. That afterwards, to wit, on the 13th May, 1822, to wit, at, &c., the plaintiffs threatened to commence an action against the defendant for the recovery of the money in the note mentioned; and thereupon the defendant, in fear of the said action, did, at the request of the plaintiffs, to wit, on, &c., at, &c., make and seal, and as his act and deed, deliver to the plaintiffs the said writing obligatory in the declaration mentioned, and the plaintiffs then and there accepted and received the said writing obligatory in lieu of *the said last mentioned promissory note, and of the said sum of money so purporting to be secured thereby as aforesaid, including also therein the sum of 5*l.* 5*s.* for the stamp impressed on the said writing obligatory and the costs thereof, and on no other account and for no other consideration whatsoever, the plaintiffs then well knowing that the said promissory note in that plea mentioned, had been made and drawn, and delivered by the defendant on the occasion and for the purpose in that plea mentioned, and on no other account or occasion." At the trial before *Abbott, C. J.*, at the London sittings after last Easter term, the execution of the bond was admitted, and White was called as a witness on the part of the defendant, and he proved that the note was given to him to cover a sum which he, as broker to the defendant, was to pay for losses on stockjobbing transactions. In May, 1819, he being in want of money, endorsed the note to the plaintiffs as a security for money which they advanced to him, but did not then inform them of the consideration upon which the note was given; but they were informed of it before the bond was executed. Upon this evidence, the lord chief justice directed a verdict to be found for the plaintiff on the second plea, inasmuch as the averment in that plea, that notice of the illegality of the note was given to the plaintiffs when they took the note, was not proved. He was further of opinion that the third plea was not proved, inasmuch as it alleged that the note was given to secure to White the repayment of money paid by White for compounding differences, whereas it appeared by White's evidence, that the note was given before the differences were actually paid. But it was contended that it was substantially proved, and a verdict was found for the plaintiffs on the first and *second issues, and for the defendant on the *576] last issue, with liberty for the plaintiff to move to enter the verdict for him on that issue, and in the event of his not succeeding in that rule, to move for judgment non obstante veredicto, on the ground that the bond was good, although the plaintiffs could not have sued on the note. A rule nisi had been obtained by the attorney-general for entering the verdict for the plaintiffs on the last issue, or for judgment non obstante veredicto.

Scarlett showed cause. The third plea is good, and was made out in proof. The defendant, therefore, is entitled to judgment on the whole record. It appears upon the plea that the bond was given as a substitution for a promissory note, which had been endorsed to the plaintiffs two years after it was due. As against these plaintiffs the defendant, therefore, would be entitled, in an action on the note, to avail himself of every defence which he would have had against the original holders. *Brown v. Turner*, 7 T. R. 630. It is averred that the plaintiffs had notice of the illegality of the original consideration before the bond was given. Here, therefore, the plaintiffs, holding a promissory note which they knew to be void, (because it was given to secure money paid for differences on stockjobbing transactions,) took the bond in lieu of it. *Cannan v. Bryce*, 3 B. & A. 179, is an authority to show that that bond is void. Secondly, the plea was supported by the proof: it was necessary in the plea to state facts sufficient to show that the plaintiffs could not recover, and it sufficed *577] to prove substantially the facts stated. When a plaintiff sets out a *contract specially, he can recover only on the contract as set out, and must, therefore, prove it literally; but it is otherwise where the contract is not specially stated. Here the substance of the plea is that the note was given to pay

differences on stockjobbing transactions, and that has been proved. It is wholly immaterial whether those differences were paid before or after the note was given. It would have been sufficient to allege that the note was given *for and in respect of* differences, &c. That is the substance of the allegation in the plea.

The *Attorney-General* contra. There can be no doubt, that by omitting or altering words the plea might be made to correspond with the evidence. The facts alleged have not been proved. The plea is, that White having paid the differences, the note was given to him for securing the repayment to him of that money which he had actually paid. The proof is, that the note was given to White to secure to him money which he had not then paid, but which he was to pay. Assuming the plea to be proved, still the plaintiffs are entitled to judgment, non obstante veredicto. Here it is alleged that the plaintiffs took the note from White after it was due, but without knowledge of the original consideration. It would undoubtedly have been a good defence to an action on the note, that it was originally given to secure money to be paid in respect of illegal stockjobbing transactions; but it is no defence to an action on the bond, which is a new security, and not made between the parties to the illegal contract. In *George v. Stanley*, 4 Taunt. 683, the defendant had given bills for the *amount of money lost at play: these bills were negotiated and came to the hands of the plaintiff, and when they became due the de- [*578] fendant gave in lieu of them other bills, and when these last bills became due, he confessed a judgment, which the court refused to set aside, unless it were shown that the holder of the bills had notice of the illegality of the original consideration. [HOLROYD, J. Here the note was endorsed after it was due, and that is a suspicious circumstance, from which the law infers, that the party taking the note had knowledge of some infirmity in the title of the holder, and the endorsee then takes it, subject to all the objections to which it was liable in the hands of the person from whom he took it.] In *Cuthbert v. Haley*, 8 T. R. 390, one Plank had discounted certain promissory notes of Haley's, and took usurious interest upon them, and then deposited them with his bankers, who gave him credit for them. When they became due, Haley not being able to pay, gave the bankers his bond. The latter had no knowledge of the usury between Plank and Haley. It was held that the bond was good.

ABBOTT, C. J. There is a great distinction between the two cases. Here the plaintiffs took the promissory note after it was due. There was no period of time when they could have maintained an action upon the note, and they had notice of the illegality of the original consideration before the bond was given. In *Cuthbert v. Haley*, the bankers had no knowledge of the usury at the time when the bond was given, and Lord KENYON, in delivering his judgment, relies upon that circumstance. We are all of opinion that, as it appears *upon [*579] the plea that the bond was given as a substitution for a note which was taken by the plaintiffs, subject to an infirmity of title of which they had full notice before the bond was taken, the latter instrument is void. The rule, therefore, for entering up judgment for the plaintiffs, non obstante veredicto, must be discharged. We also think that the third plea is not supported by proof; but the defendant may have leave to amend his plea upon paying the costs of the trial, with liberty to the plaintiffs to reply de novo. (a)

(a) No rule had been drawn up at the time when this case was printed.

HEAFORD v. KNIGHT.

Where the plaintiff was discharged under the insolvent act after issue joined, and before notice of trial given, the Court stayed the proceedings until the assignee, or some creditor of the plaintiff, should give security for costs.

DENMAN showed cause against a rule obtained by *Hutchinson*, for staying proceedings until security was given for costs. The defendant's affidavit, on

which the rule was obtained, stated the following circumstances. Issue was joined in Hilary term, 1822, and notice of trial given for the adjourned sittings after that term. That notice was afterwards countermanded, and on the 13th of May following the plaintiff was discharged under the insolvent act. The sum claimed from the defendant was inserted in the plaintiff's schedule as a debt due to him, and an assignment was made in the usual form to the provisional assignee of the court. The second notice of trial was given on the 15th of January, 1823. The defendant also swore that he had a good defence on the merits.

The Court ordered the proceedings to be stayed until the assignee or some creditor of the plaintiff should give security for the costs.

*580]

*WOOLLEY v. WHITBY.

A certificate that a trespass was wilful, to entitle plaintiff to his full costs under the 8 & 9 W. 3, c. 11, s. 4, need not be granted immediately after the trial of the cause.

TRESPASS quare clausum fregit. Plea, not guilty. At the trial before WARREN, C. J., of Chester, and *Marshall*, Serjt., at the last Chester assizes, the plaintiff obtained a verdict, damages 5s., and it appearing that the trespass was committed after notice, the plaintiff's counsel requested the learned judges to certify that the trespass was wilful, so as to entitle the plaintiff to full costs under the 8 & 9 W. 3, c. 11, s. 4. No certificate was at that time granted, but in Michaelmas term WARREN, C. J., certified, *Marshall*, Serjt., being then dead. The costs were accordingly taxed and levied under an execution. A rule was afterwards obtained to set aside the certificate, judgment, and execution, and to have the money levied returned to the defendant: against which

D. F. Jones now showed cause. It must be admitted, that the case of *Ford v. Parr and Another*, 2 Wils. 21, is in favour of the defendant. But in *Tidd's Practice*, 1002. 6th edit. several other cases are referred to, and he states the result of them to be, that the certificate required by the statute in question need not be granted at the trial of the cause; and he cites a case of *Swinnerton v. Jervis*, which is not reported. [HOLROYD, J. It is mentioned in *Reynolds v. Edwards*, 6 T. R. 11.] In *Butler v. Cozens*, 11 Mod. 198, it was taken *581] for granted, that the judge might certify under the 22 & 23 Car. 2, c. 9, at any time after the trial. The words of the statute now in question will be satisfied, if it appear at the trial that the trespass was wilful, although the certificate be not granted until a future time. [BAYLEY, J. There is a difference in the language of the first and fourth sections, which is in favour of that construction.]

J. Williams and *Campbell*, contra. Mr. Tidd certainly states that the certificate need not be granted at the trial, but he is not justified in assuming so much to have been proved by the cases which he cites. *Reynolds v. Edwards*, and two cases there referred to in a note, were questions as to the power of the judge, in granting or withholding a certificate at his discretion. *Ford v. Parr and Another* is expressly in point for the defendant; and in *Hullock on Costs*, 99, 2d edit., it is said, that the certificate, in order to be available, must be granted in court at the trial. This construction is also confirmed by the first section, which requires the certificate there mentioned to be granted immediately after the trial in open court. Now the first and fourth sections of this statute are in pari materia, and no sufficient reason can be given for making any difference between them; they should therefore receive the same construction.

ABBOTT, C. J. Had there been any clear and distinct report of a case upon this subject, or had the subsequent practice followed the case of *Ford v. Parr*, *582] which has been referred to, we should have felt bound to abide by it. The report of *Ford v. Parr* leaves open to us the supposition, that the

attention of the court was not drawn to the fourth section of the 8 & 9 W. 3, c. 11, for the judges are made to say, that the certificate must be granted "in open court at the trial." Now that is required by the first section, which relates to a matter totally different, and the expression is not repeated in the fourth section, upon which this question depends. Since the decision of the case alluded to, the opinion both of the Court and the bar seems to have been, that the certificate might be granted at any time after the trial. In *Gundry v. Sturt*, 1 T. R. 636, it certainly was so considered, and in *Good v. Watkins*, 3 East, 495, where a very extraordinary motion was made to compel the learned judge (LE BLANC) who tried the cause to grant a certificate, it was never made an objection, that it could not be granted at any time after the trial. Let us look at the act itself. In the first section it is enacted, that where one or more of several defendants, in certain actions there enumerated, shall be acquitted by verdict, every person so acquitted shall be entitled to costs of suit, in like manner as if all the defendants had been acquitted, unless the judge before whom such cause shall be tried, shall, *immediately after the trial thereof, in open court* certify upon the record under his hand, that there was a reasonable cause for making such person or persons a defendant or defendants to such action. On that section no doubt can be entertained. The certificate must be granted in open court immediately after the trial. Then the fourth section, which is now in question, enacts, "That in all actions of trespass [*583 wherein, at the trial of the cause it shall appear and be certified by the judge, under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit." It is said, that these two sections being in *pari materia*, are to have the same construction. I am of opinion, on the contrary, that the application of different words to similar matters shows that they were intended to have a different construction. The sound construction of the enactment appears to me to be, that if at the trial the trespass appears to have been wilful, the judge may grant his certificate at any convenient time. This certainly is the most proper construction, inasmuch as it gives the judge time for consideration, which he ought to have for the due exercise of the discretion vested in him by the statute. This rule must, therefore, be discharged.

Rule discharged.(a)

(a) In *Harper v. Carr*, 7 T. R. 448, it is said to have been decided in *Swinerton v. Jervis*, that a certificate under 8 & 9 W. 3, c. 11, s. 4, need not be granted at the trial.

*The KING v. The Mayor, Recorder, and Aldermen of the Borough [*584 of FOWEY.

By charter, a borough was constituted a body corporate, to have perpetual succession, by the name of the mayor and free burgesses of the borough of F. Nine of the free burgesses were to be chosen aldermen. One of the aldermen was to be called mayor. The mayor and aldermen were to form the common council: a person learned in the laws of England was to be recorder. The charter then authorized the mayor and recorder, or their respective deputies, and the rest of the aldermen of the borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time, and at all times thereafter, as often, and when to them should seem fit and necessary, to nominate, choose, and prefer so many, and such persons to be free burgesses of the borough, as they pleased, and to those free burgesses so to be chosen, to administer an oath for their fidelity to the borough. Nine persons were nominated as the first aldermen, one person as recorder, and five persons the first free burgesses; and in case any one or more of the aldermen should die, or be removed from his office, the mayor, recorder, justices of peace, and the rest of the aldermen, or the greater part of them, to elect one other of the free burgesses, in habitants of the borough, for an alderman, to supply the number of nine. The alderman so chosen taking the oaths before the mayor, recorder, or one of the justices of the peace of the borough for the time being, or before two or more aldermen, or for want of mayor, recorder, justices, and aldermen, before three or more free burgesses, inhabitants of the borough, to execute the office, and the mayor, the ex-mayor, the recorder, and their deputies, and the

senior alderman and the senior free burgess were to be justices of the peace. It appeared by affidavits that the body corporate had for three years been reduced to the number of six aldermen and four free burgesses, and that one of the aldermen was in a dangerous state of health, and was upwards of seventy years of age, and incapable of performing the duties of alderman and justice of the peace; that of the four burgesses, two were upwards of seventy years of age, and that another was not an inhabitant of the borough. The Court refused to grant a mandamus to compel the mayor and aldermen to proceed to the election of free burgesses, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election.

By charter granted in the 59th Geo. 3d., reciting a former charter, and that by reason of certain neglects and omissions in the maintenance of a distinct and separate body of free burgesses, the corporation of Fowey was in danger of dissolution, the borough was constituted a body corporate and politic, by the name of the *Mayor and free Burgesses of the Borough of Fowey*; and by that name, they were to have perpetual succession. The charter then directed, that there should be nine of the most honest and discreet free burgesses of the inhabitants of the said borough, in manner thereafter mentioned, to be chosen, *585] who should be called aldermen and council of the borough; *and that one of the most honest and discreet aldermen of the borough, to be chosen as therein mentioned, should be called mayor; and that the mayor and aldermen for the time being should be called the common council of the borough; and that there should be one honest and discreet man learned in the laws of England, who should be called recorder. There then followed this clause, "that it should be lawful for the mayor and recorder, or their respective deputies, and the rest of the aldermen of the said borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time and at all times thereafter, as often and when to them should seem fit and necessary, to nominate, choose, and prefer so many and such persons *to be free burgesses* of the said borough as they pleased, and to those free burgesses so to be chosen to administer the oath for their fidelity to the said borough, and all things faithfully to do which belong to the place of free burgesses to be done. The charter then proceeded to nominate G. G. White the first and modern mayor of the borough, and J. Kimber, T. Graham, T. Orchard, W. Rashleigh, J. Bennett, J. Hallett, J. Messer, G. G. White, and Robert Hearle, to be the first and modern aldermen of the borough, to be continued in that office for their lives, &c., unless, &c. The charter then nominated G. Lacy to be recorder during his life, and as long as he should behave well. It then nominated R. P. Flamank, C. Bennett, N. Eveleigh, G. Thomas, and T. Nickells, to be the first and modern free burgesses of the borough, to be continued in that office during their lives, unless, &c.; and in case any one or more of the aldermen of the borough for the time *586] being should die *or be removed from that office, that it should be lawful for the mayor, recorder, and justices of the peace, and the rest of the aldermen of the borough for the time being, or the greater part of them, to elect and prefer one other or more of the free burgesses, inhabitants of the said borough, for an alderman or aldermen of the said borough, in the place or places of him or them so happening to die or be removed, to supply the said number of nine aldermen of the borough aforesaid; and that he or they, so as aforesaid elected or preferred to the office or offices of alderman or aldermen of the said borough, the office or offices should have and exercise during his or their natural life or lives, unless, in the mean time as aforesaid, for ill behaviour or any other offence he or they should be removed; he or they so chosen first taking his or their corporal oath or oaths before the mayor, recorder, or one of the justices of the peace of the said borough for the time being, or before two or more of the aldermen of the said borough. And for want of mayor, recorder, justices, and aldermen (and not otherwise) before *three or more free burgesses*, inhabitants of the said borough for the time being, well and faithfully to execute that office in all things thereunto belonging. The charter then enabled the

recorder to appoint a deputy and the mayor, the ex-mayor, the recorder, and the deputies of the mayor and recorder for the time being, and also the senior alderman of the said borough and the senior free burgess of the said borough, were made justices of the peace. The affidavit then stated that the several persons named in the charter as mayor, recorder, aldermen, and free burgesses, respectively took the oaths, &c.; and that the charter had in all other respects been accepted and put in execution; *that for the last three years the body corporate had been, and still was, reduced to the number of six [*587 aldermen and four free burgesses; that of the six aldermen, one J. Kimber was in a very dangerous and precarious state of health, having had a paralytic stroke, and being upwards of seventy years of age, and that from such age and infirmities he was incapable of attending to his duties as an alderman and justice of peace; that of the remaining four free burgesses, one T. Nickells was upward of seventy years of age, and was in a very infirm and dangerous state of health; that another, viz., R. P. Flamank, was also seventy years of age; and that another, N. T. Eveleigh, was not an inhabitant of the borough, and therefore not qualified to be elected an alderman according to the charter; that in consequence the said body corporate had been for some time and still was in great danger of being dissolved.

Wilde in the last term had obtained a rule nisi for a mandamus, directed to the mayor, aldermen, and recorder, commanding them to proceed to the election of a competent number of free burgesses of the borough, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election.

Adam and *Bernard* now showed cause. A mandamus will not lie to compel a corporation to elect members of an indefinite body. It issues only in cases of necessity, and to supply a defect of justice. There is no case in the books in which such a writ as that now asked for has been granted. In Buller's N. P. 201, it is laid down, "that where by charter or prescription the corporate body ought to consist of a *definite* number, and they neglect to fill up *the [*588 vacancies as they occur, the Court will grant a mandamus." From this passage it may be inferred to have been the opinion of the learned writer, that a mandamus would not lie to compel a corporation to elect members of an *indefinite* body. So a mandamus will not lie to do an act which a party may do or not at his discretion. Per *HOLT*, Comyn's Dig., *Mandamus*, B 1. In *The Queen v. Heathcote*, 10 Mod. 54, *Eyre*, J., says, all writs of mandamus are either to restore persons turned out, or to admit persons refused. In *Rex v. Pateman*, 2 T. R. 777, it was stated in argument at the bar as a clear proposition, that a mandamus would not lie to compel the corporation of Bedford to fill up the office of alderman, because the number was *indefinite*. These authorities show that the general opinion in the profession has been, that a mandamus does not lie to compel a corporation to elect members of an indefinite body. But, secondly, there is no necessity in this case for granting a mandamus. For if it be refused, there is no danger of the dissolution of the corporate body. It is true, that if an integral part of a body politic be destroyed, and *the remaining parts have no power to restore it*, the corporation is dissolved, because it has lost an essential attribute, viz., capability of perpetual succession, *Rex v. Pasmore*, 3 T. R. 199. But in this case, if all the free burgesses became aldermen, the corporation would still be in no danger of dissolution, as the mayor, recorder, and aldermen would be competent to nominate, choose, and prefer such persons to be free burgesses as they pleased. Free burgesses are necessary only for two purposes: first, as a body out of which the *aldermen are to be [*589 chosen; and secondly, for the purpose of assisting at the election of a mayor on the charter day. Now, assuming, that all the present existing free burgesses were made aldermen, it would be competent to the latter body to proceed immediately to elect free burgesses, but there is no present duty in the now court of aldermen to proceed to the election of free burgesses before the

vacancies in the court of aldermen are filled up; and it would be contrary to the spirit of the charter to compel them so to do. For the aldermen are a definite body consisting of nine, and the free burgesses are to be elected by the mayor, recorder, and aldermen. The charter contemplated, therefore, that the free burgesses should be elected by a majority of the nine aldermen. Now, if the present mandamus were granted, the election of free burgesses would be by a majority of five; but it is obvious, that the course to be pursued according to the spirit of the charter in the present circumstances of the corporation is, first, to fill up the vacancies in the definite and electoral body of aldermen; and then, when that body is complete, secondly to proceed to the execution of its functions by nominating, choosing, and preferring such persons to be free burgesses as the majority of that perfect body shall think fit.

Gaselee and Wilde contrâ. By the charter a present duty is created in the alderman to elect free burgesses, or at least to meet to consider of the propriety of making such election. The charter appoints nine aldermen. Of these offices three are now vacant, and there are only three efficient free burgesses. Con-
 *590] sequently, if all the vacancies in the court of aldermen were filled up, *there would not be any efficient free burgess left. Although it has never been decided that a mandamus will lie to compel a corporation to elect members of an indefinite body, yet, if there be a duty to fill up vacancies in such a body for the purpose of perpetuating the corporation, then a mandamus will lie, because it is necessary for the purposes of justice. It is incumbent on those who apply for a mandamus in such a case to show that the necessity exists, or in other words, that the charter will be defeated unless the election takes place. Now in this case, unless the aldermen elect more free burgesses, the corporation is likely to be dissolved. Free burgesses are a necessary constituent part of the corporation. The senior free burgess is to be a justice of the peace, and in the absence of the mayor, recorder, and aldermen, certain oaths are to be administered by three free burgesses. The charter, therefore, contemplated that there should be always three free burgesses, and although there are that number at present, yet if the vacant offices be filled up, there will not be any efficient free burgess left. Besides, there ought to be a sufficient number of free burgesses to afford the aldermen the means of selection for filling up vacant offices in their body. But here, there being only three to fill the same number of vacant offices of aldermen, the latter will be filled by succession, and not by election as the charter directs.

ABBOTT, C. J. I am of opinion that we ought to discharge this rule. There is no instance in which the Court has ever granted a mandamus to compel a corporation to elect members of an indefinite body. The general principle of
 *591] the Court, in issuing a mandamus, *is very well defined to be, that whenever it is the duty of a person to do an act, the Court will order him to do it. The question is, whether, in the present state of the corporation, there is an imperious duty upon this body to proceed in the first place to the election of free burgesses. In this case, by the charter, there are nine aldermen, and an indefinite number of free burgesses, with a power for the corporation, from time to time, as they think fit, to elect persons to become free burgesses, and five are named free burgesses, and there are at present at least three free burgesses against whom there is no objection. Now, the following acts are to be done by the free burgesses: first, the senior is to be a justice of the peace. Secondly, they are to concur with the aldermen in the election of the mayor, and three of them are competent to do that. And in the absence of the mayor, recorder, and aldermen, they are to administer the oath to the persons elected aldermen, and three free burgesses may administer the oath. There are three, therefore, to administer this oath, if it be requisite for them to do so. Then the question really comes to this, whether we shall order the corporation to elect free burgesses before they proceed to the election of aldermen. There

is a sufficient number of free burgesses remaining to fill up the vacancies occasioned by the loss of the aldermen; but it is said, that if all the vacancies were filled up, there would be no efficient free burgess remaining, for that the one remaining is incapable of acting in the discharge of his duty. That may be so, but at present there does not appear to me to exist any necessity for granting this mandamus. It is said that we ought to make them elect free burgesses, in order to give the aldermen a more numerous class of *free burgesses, from whom they may choose the new aldermen, and thus [*592 give them a greater number of persons, out of whom the choice may be made; but I do not know how we are to do that, for what greater number are we to give? Will five be sufficient, or twenty? The greater the number, there is certainly more opportunity of choice and selection, but we cannot say what number they ought to elect, with a view of giving a sufficiently large class out of which the aldermen may be chosen. It is worthy of observation, too, that the present free burgesses are those originally appointed by the charter of the crown, which directed the aldermen to be filled up out of the burgesses, and, therefore, the crown having proposed those five persons to be made free burgesses, considered them to be fit persons to fill the office of aldermen when vacant. Unfortunately this corporation have allowed a large number out of the nine offices of aldermen to become vacant, without filling up any one, and it may be that delay may have the effect of leading to a dissolution, but I cannot say that it will have that effect. If a mandamus were to issue to elect, and it was duly served upon all those whose duty it is to be present at such an election, if they should forbear to perform their duty, without assigning any good reason for such forbearance, the Court would know how to visit them for not having obeyed. It seems to me, however, that at present that strong case of necessity which ought to be made out in order to call upon the Court to direct the choice of free burgesses, prior to the choice of aldermen, has not been established. For these reasons I am of opinion that this rule must be discharged.

*BAYLEY, J. For a considerable period of time my impression was, [*593 that we ought to grant a mandamus in order that a court might be held at which the corporation might exercise their judgment as to whether they would elect free burgesses or not, and whether they should elect burgesses before they went to the election of aldermen. But, upon consideration, it seems to me that we ought not to interfere at all; "*vigilantibus et non dormientibus jura suberviunt*" is a very good and useful rule, and one which may with propriety be applied to corporation cases. In this case there appears to me to have been great negligence in those persons on whose behalf this application is made. It was the duty of the existing corporation, as soon as a vacancy occurred, to have insisted upon its being filled up forthwith, and if that had been done then, inasmuch as the charter directed that the aldermen should be filled up out of the existing burgesses, and no new burgesses had been elected, the choice must have attached upon one of the then existing burgesses, and as soon as the vacancies were filled a majority of the nine must have concurred in deciding whether there should be any more free burgesses or not; and when a second party died the same question would have been again raised. Here, however, the parties have thought fit to wait until the number of aldermen has been reduced nominally from nine to six, and substantially to five, and, consequently, there are now in this corporation, when there ought to have been nine aldermen, five only. Now the charter has said, that it shall be in the judgment of the nine whether there should be any and what free burgesses; and if in this case we were to grant the mandamus, the new free burgesses would be elected, *not by a majority of nine, but by a majority of five, which, [*594 as it seems to me, would be working some injustice, because that might entirely supersede the inchoate rights which the present existing burgesses originally obtained. For if, when the first vacancy had occurred, they had

proceeded to an election, it is morally certain the choice must have fallen upon one of those, whereas, if the majority of the existing body are inimical to the interest of the present existing burgesses, you may have an entirely new set of burgesses, not named in the charter, elected to the vacant offices of aldermen. For these reasons I think the rule ought to be discharged.

HOLROYD, J. I am of the same opinion. By the charter, the mayor and aldermen are to elect such and so many free burgesses as they shall think fit. It is not competent, therefore, to the Court to grant a mandamus directing them to elect any. Whether a mandamus may be granted to compel the persons who, by the charter, were appointed to elect, to attend, in order to form a meeting to consider what free burgesses should or should not be elected, is another question. Without saying whether a mandamus would lie in such a case or not, I certainly doubted very much whether, supposing it would lie, this case was not a fit case for it to be granted. The result of the consideration which I have given to the subject is, that it ought not to be granted under the present circumstances; for although there are five free burgesses named in the charter, they are not to be considered as a definite body, for by the preceding part of the charter the mayor and aldermen may elect such and so many as they shall think fit; but in order that *in the mean time there should not be wanting a body of free burgesses, the charter nominates five, but it does not, as in the case of aldermen, direct that there shall be any election to supply the places of the five burgesses nominated. It seems to me, therefore, to be an indefinite body, of which the crown, in the first instance, nominated five, the number being to be indefinite, according to the will of the corporation, always supposing the members to act properly in the discharge of their duty. With respect to the aldermen, I take it to be the duty of the corporation, within a reasonable time after a vacancy in the number of aldermen has occurred, to fill up that vacancy, so that the body of nine should be completed, in order that the functions of aldermen and mayor (the mayor being one of the nine) should be performed, and that the town might have the benefit of the whole body to perform those functions. The question in this case seems to be, whether the election of free burgesses shall be by the majority of the five or six aldermen now existing, or whether it should be by a majority of the whole number of nine. If the present mandamus is to be granted, it could only be to consider whether they will elect or not; and even if they then determined to elect free burgesses, the election could not be by the full number of aldermen, whereas, if we require the aldermen to fill up the vacancies in their body in the first place, that would be agreeable to the intention and provisions of the charter. It appears to me, therefore, that the present mandamus ought not to be granted.

BEST, J. Although I entertain some doubts upon this question, the inclination of my opinion is, that the *mandamus ought to be granted. Undoubtedly it was the duty of the aldermen, from time to time, to fill up vacancies; but, assuming that they were culpable in not filling them up, I think that is not any reason why we should not grant this mandamus, for this is not a question in which the interests of the aldermen only are to be considered, but the interests of the town; and those interests ought not to suffer from the negligence of any member of this corporation. It is said, that we have not the power to grant this mandamus. If this application had been made a century ago, it would not probably have been granted, for at that time a mandamus was held to lie only to compel the performance of a ministerial duty, but modern cases have gone much further, and a mandamus now will lie for the performance of any public duty. In Buller's N. P. 201, it is said, that where by charter or prescription the corporate body ought to consist of a definite number, and they neglect to fill up the vacancies as they happen, the Court will grant a mandamus, and the reason of that is, because the filling up of the definite body is necessary to give perpetuity to the corporation. Now if the

same reason applies to an indefinite body, it follows, that the Court ought to grant a mandamus to elect the members of that indefinite body. In this case, it appears to me, that in order to prevent the dissolution of this corporation, it is necessary that free burgesses should be elected. The king, by his charter, has granted that the body should be perpetual. It is therefore necessary for every component part of that body politic to do all that is essential to the preservation of the corporation. Now what is essential to its preservation? Not a mere formal election, but a substantial election of the members *of that corporation. Is not this corporation reduced to a state in which, if an alderman died, new free burgesses could not be elected? Besides, the three existing free burgesses may force themselves into the court of aldermen, and every one of them may be incompetent to fill that office. There are now, indeed, four free burgesses, of whom one is a non-resident: but supposing there were only two, those two could force their way into the court of aldermen. I agree that we are bound to assume that these persons were duly competent to fill the office of free burgesses, because they are nominated in the charter, but a man may be fit to be a free burgess, and not fit to be an alderman. The latter is an office of magistracy, and the person who is fit to be a free burgess may be unfit to exercise the functions of a magistrate. With respect to inchoate rights I cannot agree that a person is to be elected because he is eligible. A man may be eligible, and still not have a right to be elected. It seems to me, that whenever a corporation is reduced to that state in which there is no choice of persons to fill up the offices which by the charter are directed to be filled up by election, it is then in a state in which it is necessary for the Court to interfere to compel them to do all that is necessary, in order that something like a free choice may take place. There cannot be any free choice in this instance. Although at present it appears that there are three persons eligible, still that will not bear the name of election; it is succession; and the moment that the three succeed the corporation will be entirely at the mercy of the majority of the whole. It seems to me, to be a clear principle of law, that where there is a strong political necessity for an act to be done, this Court has a right *to require that it shall be done; and I think also, that in this case there exists that degree of necessity. From the cases which have been cited, it appears that it has never been decided that a mandamus does not lie to compel the election of members of an indefinite body. Then, does not the principle upon which the Court has proceeded apply to an indefinite body, when reduced to one or two, as strongly as to a definite body? With respect to the dictum of *Eyre, J.*, cited from 10th Modern, I cannot admit that to be law, because that would equally prevent the Court from adding to the number of a definite body. The true principle is, that this prerogative writ shall be granted in all cases where the justice of the country requires that it should be granted. If justice does not require it to be granted, the granting of it would be an abuse of the power vested in the Court. But if we see that justice will be defeated if it is not granted, we are not to be fettered in the exercise of our authority, by being told that in ancient times such a writ would not have been granted. For these reasons, it appears to me that the rule granting a mandamus ought to be made absolute.

Rule discharged.

The KING v. RAWSON and Others.

Where the defendants, in an indictment for misdemeanour, submitted to a verdict of guilty, upon an understanding that they were not to be brought up for judgment: *Held*, that the prosecutor was not entitled to costs, no agreement having been expressly made respecting them.

THE defendants were indicted for a riot and assault. At the trial at the last Lancaster assizes, before HOLROYD, J., they submitted to a verdict of guilty.

*599] upon an understanding that they were not to be brought up *for judgment. Nothing was then said about the costs. A side-bar rule for taxing the prosecutor's costs having been obtained, *Scarlett* moved to discharge that rule.

Cross, Serjt., showed cause, and contended, that where defendants submit to a verdict of guilty, upon an understanding that they are not to be brought up for judgment, it is always considered a term in the agreement, that the prosecutor's costs shall be paid.

Abbott, C. J. When a prosecutor agrees not to bring up a defendant for judgment, and expects in return to receive some advantage to which prosecutors in general are not entitled, he should take care to have it clearly expressed at the time. In such a case as the present it is certainly rather a nice point to decide, whether the prosecutor should have expressed his expectation of the costs, or whether the defendants should have particularly excluded them from their agreement. But upon the whole we all think that they should have been mentioned by the prosecutor.

Rule absolute for discharging the side-bar rule.

*600]

*Ex parte ALDRIDGE.

In a conviction under the 3 G. 4, c. 110, it is necessary that the offence should appear to have been proved on the oath of one or more credible witnesses, and therefore, where the conviction stated, "that R. A. was convicted of carrying brandy liable to seizure," (without saying upon oath) and proceeded, "and it is this day, in like manner, also proved, on the oath of J. H., that the brandy was taken from R. A., and that he was detained by an officer of the navy, &c.:" Held, that carrying the brandy was the offence, and as that was not stated to have been proved on oath, the conviction was bad, and that R. A. (having been committed to prison,) was entitled to be discharged.

ROBERT ALDRIDGE, a prisoner in the jail of Hastings, was brought up by writ of habeas corpus, and the jailer set out in his return a warrant for the imprisonment of Aldridge in pursuance of the following conviction, which was brought up by certiorari. "Be it remembered, that on, &c., at, &c., R. Aldridge hath been duly convicted before me, E. M., one of his majesty's justices, of the peace residing near the place where the offence was committed, of having within three months last past, to wit, on, &c., at, &c., (he, the said R. A., then and now being a subject of his present majesty,) been found carrying and conveying, and assisting in carrying and conveying, contrary to the form of the statute in that case made and provided, divers, to wit, eight gallons of foreign brandy, then and there subject and liable to forfeiture under and by virtue of an act of parliament relating to the revenue of customs and excise in the United Kingdom, for that the said brandy, being goods liable to the payment of customs and other duties, had been then and there unshipped with intention to be laid on land, customs and other duties not being first paid or secured, contrary to the form of the statute, &c. And it is this day in like manner also proved on the oath of Joseph Hancock, to and before me the said justice, that the said brandy was then and there, to wit, on, &c., at, &c., seized and taken from the said R. Aldridge; and that he, the said R. A. (being a subject of his said majesty as aforesaid,) was then and *there found, taken, stopped, arrested, and detained

*601] by one J. G. F.; he, the said J. G. F., then and there being an officer of his majesty's navy, and brought and carried before me the said justice, residing near to the place where the said R. A. was so found, taken, and arrested, and detained by the said J. G. F. as aforesaid; and that the said R. A. is not fit and able to serve in the navy; I do therefore adjudge that the said R. A. hath for such offence forfeited the sum of 100*l.*, pursuant to the act passed in the third year of G. 4, entitled, &c." The return having been read,

Platt moved that the prisoner might be discharged out of custody, for that it did not appear by the conviction that the offence with which the prisoner was charged had been proved upon oath by any credible or other witness.

Shepherd showed cause. It is true, that in the first part of the conviction where the offence is stated, no mention is made of the evidence by which it was substantiated. But then it proceeds, "And it is this day in like manner also proved on the oath of J. H., &c.:" it is therefore clear upon the whole, that the offence was proved on the oath of J. H.

ABBOTT, C. J. I do not find any thing in this conviction to which the expression "in like manner" can refer. In the former part, the statement is merely that R. A. was convicted. It is not any where alleged that he was proved upon oath to have been found carrying and conveying the brandy. Now that is the offence of *which he was convicted, and as it does not appear that the conviction proceeded upon proper evidence, the prisoner must [*602 be discharged.

Prisoner discharged.

The KING v. Mayor, &c. of GRAVESEND.

Where the charter of a corporation provided that there should be a high steward and an under steward, and imposed upon the latter various judicial and ministerial duties, and did not give him power to appoint a deputy: *Held*, that he could not appoint a deputy generally to discharge all the ministerial duties of his office. Although a by-law of the corporation required that he "or his sufficient deputy" should attend at every court to execute the duties of the office.

Quære, whether he could have made such an appointment for the discharge of any particular ministerial duty?

A RULE had been obtained, calling upon the mayor, jurats, and inhabitants of the villages and parishes of Gravesend and Milton, in the county of Kent, to show cause why a mandamus should not issue directed to them, commanding them to admit F. Southgate and G. N. Rich as deputies and nominees of C. Vesey, sub-seneschal or under-steward of the said villages and parishes, to enrol and enter all indentures of apprenticeship of apprentices taken by the inhabitants of the said corporation, to enrol all freedoms of such apprentices, and to enter in a ledger or book the acts and matters agreed upon at any courts or assemblies of the said corporation, and to discharge all other ministerial duties belonging or annexed to the said office. It appeared by the affidavits, that by a charter of the 7 Car. 1, the foreman, jurats, and inhabitants of the villages and parishes of Gravesend and Milton, in Kent, and their successors, were created a corporation by the name of the "Mayor, Jurats, and Inhabitants of the villages and parishes of Gravesend and Milton, in Kent." They were to have one capital seneschal or high steward, and one other person skilful in the laws of the kingdom, sub-seneschal or under-steward; that he should inhabit and reside in the villages and parishes aforesaid, unless the mayor, jurats, *and inhabitants for the time being dispensed with it; and power was given to [*603 the corporation to make by-laws for declaring after what manner the mayor, jurats, and inhabitants, and their officers and ministers, should behave and demean themselves in their offices and functions. On the 20th of March, a by-law was made requiring that all inhabitants taking apprentices should bring their part of the indenture to the mayor to be signed and allowed, and that the sub-seneschal should then enrol it in a book kept for that purpose, and also should enrol the freedom of every person having served an apprenticeship of seven years, and then claiming his freedom. Another by-law, made at the same time, required, that all acts and matters agreed upon at any courts, &c., holden by the mayor, jurats, and common council of the corporation, touching or concerning the good or government of the same, should, by way of act or order, be forthwith drawn up and entered in some ledger or book, to be kept for that purpose by the under-steward of the corporation for the time being. That the said under-steward or recorder for the said corporation for the time being, or his sufficient deputy, should be attended at every court of record holden before the mayor and jurats of the corporation, and there should well and faithfully, ac-

cording to his utmost skill, do, perform, and execute all and every such thing and things belonging to his said office. On the 21st of March, 1822, the Hon. C. Vesey, barrister at law, was elected sub-seneschal of the corporation, and sworn in on the 8th of April, when his residence was dispensed with. The sub-seneschal appointed Southgate and Rich, attorneys of the Court of K. B., his deputies and deputy, to perform on his behalf the several ministerial duties belonging to his office, and particularly those mentioned in the by-laws above set forth. Southgate and Rich required to be admitted to the performance of those duties, and on the 19th of December, 1823, presented themselves at a meeting of the corporation, when they were excluded from it. Besides the ministerial offices mentioned in the by-laws, the sub-seneschal had several judicial duties to discharge which were imposed upon him by the charter; he was to hold a court of record and act as a justice of peace. The charter did not give him power to appoint a deputy, and upon searching the muniments and records of the corporation for the last two hundred years, it did not appear that any appointment had been made by the sub-seneschal or recorder of a deputy sub-seneschal or recorder.

Gaselee and Chitty were called upon to support the rule. It may be admitted that the sub-seneschal could not have appointed a deputy generally, inasmuch as he has to discharge certain judicial functions, and the charter has not authorized the execution of them by deputy. But the appointment in question is confined to ministerial duties, and the by-laws of the corporation authorize such an appointment, for they require the attendance of the sub-seneschal or his deputy for the purpose of discharging the duties of that office.

ABBOTT, C. J. I am of opinion that this rule for a mandamus must be discharged. It is not a rule requiring that the deputy should be allowed to do some particular act, but that these applicants should be admitted generally to do all ministerial acts, which would be to make them corporate officers. The law of the land does not allow such an appointment, unless it is provided for by the charter. Whether, if the appointment had been to do some particular act, and the corporation had allowed the deputy to do it, that would or would not have been valid, is a very different question. The sub-seneschal clearly had no power to introduce these persons into corporate meetings against the will of the corporation, and we should give him that power were we to make this rule absolute.

Rule discharged.

The Attorney-General, Scarlett and Comyn, were to have opposed the rule.

The KING, on the Prosecution of JAMES LAW, v. WILLIAM MEAD.

Defendant having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor, and on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose: *Held*, that it could not be read; for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration.

The defendant was indicted for perjury, and, at the Middlesex sittings after Michaelmas term, 1822, before ABBOTT, C. J., was found guilty. In Hilary term, 1823, a rule for a new trial was obtained by the attorney-general, on the ground of the verdict having been against the weight of evidence and upon affidavits.

D. F. Jones and Chitty now showed cause, and, amongst others, tendered affidavits, stating a dying declaration of James Law, the prosecutor, who was shot by the defendant after the conviction. The perjury assigned, and of which the defendant was convicted, consisted in Mead's swearing, upon the trial of an information in the Exchequer, that Law had been present at and engaged in a smuggling transaction, at a place called the Salt Pans, in the

parish of Scalby, in the county of York, on the 20th August, 1820, and upon the trial of which information Law was acquitted. The dying declaration of Law, after giving an account of the circumstances under which he was shot by Mead, proceeded to negative his having been present at, or having had any concern whatever in, the smuggling transaction deposed to by Mead in the Court of Exchequer.

The *Attorney-General*, Clarke, Gurney, and Walton objected to these affidavits of the dying declaration being received. Dying declarations are only admissible in criminal prosecutions, where the death of the deceased, and the circumstances of the death, are the subject of the charge against a prisoner, whereas here the statement, disclosed by the affidavits tendered, was not made with reference to the death of the dying man, but with reference to the antecedent charge of perjury. In *Doe dem. Sutton v. Ridgeway*, 4 B. & A. 53, it was held that the dying declarations of a person, as to the relationship between the lessor of the plaintiff and the person last seised, could not be received in evidence.

D. F. Jones and Chitty, contra, contended, that the affidavits as to the dying declarations were admissible. The general principle upon which such evidence is competent, is founded partly on the situation of the dying man, which must be taken to have as much *power over his conscience as the sanction of any oath could have, and partly on the manifest absence of any interest, [*607 when he is on the point of passing into another world. *Lord Mohun's case*, 12 St. Tr. 949; *Rex v. Reason*, 1 Str. 499; *Tinkler's case*, 1 East, P. C. 354; 2 Hume's Com. on the Law of Scotland respecting Crimes, 391. The rule contended for on the other side, limiting evidence of this kind to cases of inquiry as to the cause or circumstances of death, is much too narrow, for in *Wright d. Clymer v. Littler*, 3 Burr. 1244, evidence of a dying confession by the subscribing witness to a deed was held to be admissible. So also in the case before HEATH, J., cited in *Avison v. Lord Kinnaird*, 6 East, 195, the confession of an attesting witness to a bond, who, in his dying moments, begged pardon of heaven for having been concerned in forging the bond, was received. Secondly, there was a connection in this case between the transaction to which the dying declaration referred, and the occasion of the death. The false accusation, which the dying declaration referred, was the foundation of the personal hostility which led to the death. Thirdly, whether it would have been evidence on the trial or not, it may be received for the purpose of satisfying the Court upon the question of granting a new trial, in the same way as affidavits by parties themselves are received on similar occasions.

ABBOTT, C. J. We are all of opinion that the evidence cannot be received. In the case before Mr. Justice HEATH, the declaration amounted to a confession *by the party himself of a very heinous offence which he had committed. The same observation applies to the case of *Wright v. Littler*. [*608 Here, the dying declaration of Law was for the purpose not of accusing, but of clearing himself. It therefore falls, not within the exception on which those decisions proceeded, but within the general rule, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. (a)

The affidavits were rejected.

(a) The same point was ruled in *Rex v. Hutchinson*, tried before Bayley, J., at the Durham Spring Assizes, 1822. The prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry.

MARY THRESHER v. The Company of Proprietors of the East LONDON Water Works.

Lessee, who has erected fixtures for the purpose of trade upon the demised premises, and afterwards takes a new lease to commence at the expiration of his former one, which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist to show that they were not intended to pass under the general words of the second demise.

Quere, whether any circumstances dehors the deed can be alleged to show that they were not intended to pass?

Quere, whether limekilns, erected for the purposes of trade, are removable?

COVENANT on a lease. Breach, non-repair of premises. Plea, performance of the covenant. The cause was tried at the sittings at Guildhall after Trinity *609] term, 1823, when a verdict was found for the plaintiff, damages 500*l.*, subject to the opinion of the Court upon a case, stating in substance as follows. The lease upon which the action was brought, was a lease by indenture made by the plaintiff's ancestor to the defendants in the year 1791, reciting a former lease between the parties under whom the plaintiff and defendant claimed, made in the year 1756 for thirty-nine years; and which would not expire until 1795, and was in force at the time of making the lease in question. An underlease of part of the premises was granted in 1783, by the lessees in the lease of 1756, to one Joseph Matthews for thirty-one years, and which, consequently, would not expire until 1814, several years after the expiration of the lease of 1756. The underlease of 1783 was granted in consideration of a former underlease, which had become vested in Joseph Matthews, and there was a covenant to repair, and to leave at the end of the term the premises so repaired, together with all such erections and buildings as then were or should be at any time thereafter built or set up in, upon, or about the same, or any part thereof. In 1780, Matthews erected a limekiln on the premises, at the expense of 160*l.*, and T. Ayres and Joseph Watford, the assignees of the term granted to Matthews, erected a similar limekiln on the premises in 1790. It also appeared by the underlease of 1783, that a warehouse and stable were then standing on the premises thereby demised. Both these limekilns were therefore existing in 1791, when the lease in question was granted. The limekilns were built of brick and mortar, and the foundations let into the ground. They were erected for the purpose of carrying on the trade of a limeburner. The chalk and coals used in the business were brought up the river *610] Thames, and the lime sold on the premises to customers. By the lease of 1791, the demise was of a piece of ground formerly called the Ozier Hope, and the wharves and buildings erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756; and the premises were said to be in the occupation of the several persons therein named, and among others, of James Ayres, *limeburner*, habendum the said piece of ground, wharves, and buildings thereon erected and built. The lessees covenanted to repair, uphold, and maintain this piece of ground, *erections, and buildings, wharves, cranes, and ponds, and the hedges, ditches, pales, and fences, belonging to the premises, and the said premises so repaired, upheld, and maintained, to leave and yield up at the end of the term.* The action was brought for the removal of these limekilns. The lease of 1783 afterwards became vested in one Meeson, who, after the expiration of the term thereby granted, held the premises thereby demised for some time, as tenant from year to year, to the defendants, and pulled down the limekilns four years ago. The question in the cause was, whether the removal of those limekilns was a breach of the covenant to repair contained in the lease of 1791?

Amos for the plaintiff. The limekilns were demised by the indenture of 1791. Fixtures will pass by a conveyance of the freehold. *Colegrave v. Dias Santos*, 2 B. & C. 76. Until severed, they are a part of the freehold, and the

lessee has only a continuing privilege in respect of them, *Lee v. Risdon*, 7 Taunt. 188. A new agreement for the enjoyment of the land puts an end to the right of the tenant to *remove them, *Fitzherbert v. Shaw*, 1 H. B. 258. Under [*611 a demise of lands, though some buildings are specifically named, yet all other buildings pass, Com. Dig., *Grant*, E. 3. It is true the demise is of the premises, as the same were demised by the former lease, and the limekilns were not in existence at the commencement of the former lease; yet buildings erected during a lease are considered in law as demised. *Lord Darcy v. Askwick*, Hobart, 234; Fitz. N. B. 55. The case of *Burton v. Brown*, 2 Cro. 648; Palmer, 319, is very similar to the present in that respect. The premises were potentially demised by the first lease, *Brown v. Blunden*, Skinner, 121. Then if the limekilns were demised as part of the land, or under the name of erections and buildings by the indenture of 1791, it is clear, from the case of *Naylor v. Collinge*, 1 Taunt. 19, that the lessee was bound to repair them, although they were erected for the purposes of trade. Secondly, these limekilns could never have been removable as fixtures. No case has determined that fixtures may be removed where destruction must precede their removal. Were the contrary determined, it would authorize the pulling down of extensive manufactories erected during a lease for the purpose of trade, which would manifestly defeat, instead of promoting the commercial interests of the country, out of regard to which the exception in favour of trade has been engrafted on the rule of the common law respecting fixtures. To make an instrument of trade capable of removal, it must have been in its own nature a chattel, before it has been set up. *Lawton v. Lawton*, 3 Atk. 13. These limekilns have always been in a freehold state. The case of *Panton v. *Robart*, 2 East, 88, is distinguishable from the present, inasmuch as there the varnish-house, which was removed, had been brought from another place, where the defendant carried on his trade. In *Dean v. Allaley*, 3 Esp. 11, the description of the premises does not appear, or what parts were taken away; and in *Poole's case*, Salk. 368, though pavement is mentioned in the pleadings, it cannot be collected from the judgment, that the Court considered it removable.

Campbell, for the defendant. The first lease, which was granted in 1756, did not expire until 1795. It was a continuing lease, therefore, in 1791, when the last lease was granted. The limekilns at that time had been erected; they might therefore have been removed at any time during the continuance of the term granted by the lease of 1756; and if so, they must continue to be removable. It is stated that they were erected for the purposes of carrying on the trade of a limeburner. The Year-book, 20 H. 7, fol. 13, pl. 24, *Poole's case*; *Elwes v. Maw*, 3 East, 38, are authorities to show that they may be removed during the term, and *Panton v. Robart* shows, that a tenant may remove the fixtures at any time while he is in possession of them, even though he be a trespasser in respect of the land, by holding over; a fortiori, therefore, he may remove while he is in possession of the land under a new demise. The limekilns were the property of the lessee and not of the lessor, at the time when the last lease was granted; they did not therefore pass by the demise, for the landlord could *demise only that which belonged to him. The lessee [*613 is not estopped by the lease from saying that the limekilns were not the property of the lessor, because the buildings demised were the same as were demised by the lease of 1756, and at that time the limekilns were not erected.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the Court; and, after stating the facts of the case, proceeded as follows.

The question in the cause is, whether the removal of the limekilns be a breach of the covenant to repair, contained in the lease of 1791.

On the behalf of the defendants three grounds of objection were taken.

First, that limekilns are not buildings within the meaning of a covenant to

repair buildings; but this is answered by the case, in which it is found that they were erected with brick and mortar, and their foundations let into the ground.

Secondly, that, being erected for the purpose of trade, they were removable generally.

Thirdly, that, upon the true construction of the several leases set forth in the case, they were removable, or rather that they were not to be considered as having been demised by the lease of 1791.

By this lease of 1791 the demise is of a piece of ground formerly called the Ozier Hope, and the wharves and *buildings* erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756, and the premises are said to be in the several occupation of persons therein named, and among others of *James Ayres, limeburner*, habendum the said piece
 *614] *of ground, wharves, and buildings thereon erected and built. The leasees covenant to repair, uphold, and maintain the said piece of ground, *erections and buildings*, wharves, cranes, and ponds, and the hedges, ditches, pales, and fences belonging to the premises; and the said premises so repaired, upheld, and maintained, *to leave and yield up* at the end of the term.

Now it is settled, by the case of *Naylor v. Collinge*, 1 Taunt. 19, that buildings erected for the purpose of trade, under a lease containing such a covenant, cannot be removed by the lessee, the terms of the covenant being general, and containing no exception. And this is highly reasonable, because the expectation of buildings to be erected during a term, and left at its expiration, is often one of the inducements to the granting of a lease, and forms a considerable ingredient in the estimate of the rent to be reserved. And if buildings for trade erected during a lease cannot be removed without the breach of such a covenant, neither can buildings erected before, and existing at the date of a lease, be removed without a breach of the covenant, unless there shall be some very special matter to take them out of the operation of the covenant. Whether any matter capable of having such an effect can exist dehors the deed may be questionable; but it is enough for the purpose of the present cause to say, that no such matter exists in this case.

Such matter was supposed to be derivable from the former lease of 1756, and the underlease of 1783.

In the lease of 1756 the premises are described as "all that piece of ground called the Ozier Hope, with the use of a crane, then standing on part of it, and
 *615] part *of which had been made into a wharf, for the landing, storing, and keeping goods, wherein are two docks, and the wharf is fenced off by pales, and part of which was formerly an ozier ground, but then converted into three ponds or reservoirs. It does not appear by the case whether any covenant to repair was contained in this lease, and the instrument is probably lost, and its contents known only by the recital of it in the lease of 1791, in which it further appears, that the lessees had applied for a further term of thirty-one years, which is granted at a considerable increase of rent. There is, therefore, nothing in this lease of 1756 that can restrain or qualify the covenant to repair in the lease of 1791; and it has not been shown by what reason or rule of law the lessees of 1791, having accepted a lease (by indenture) of ground and buildings thereon, could be allowed to say that the ground only, and not the buildings thereon, should be deemed to pass by that lease. It would be very difficult to maintain such a proposition, by the circumstance of the buildings having been erected by their under-lessee during the continuance of the first lease, even if such under-lessee, as between him and his own immediate lessor, had a right to remove the buildings; for the original lessor might very reasonably say, that he had nothing to do with any contract between other parties. But, upon adverting to the underlease of 1783, the foundation of such an argument is wholly removed, because, by the terms of that underlease, the under-lessee, Matthews,

has covenanted, not only to repair and uphold the premises demised to him, but also to leave, at the end of the term, those premises so repaired and upheld, *together with all such erections and buildings as then were or should be at any time thereafter built or set up, in, upon, or about the same, or any part thereof.* So that, according to the case of *Naylor v. Collinge*, the under-lessee himself could not have removed those limekilns without a breach [*616] of his covenant made with his own lessors.

For these reasons our judgment is in favour of the plaintiff; and the postea is to be delivered to her.

Judgment for the plaintiff.

LAMBERT v. BUCKMASTER.

An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt, subsequently to the issuing of the commission, to recover the amount of his bill.

JOHN BUCKMASTER and William Buckmaster, co-partners in trade, were declared bankrupts November 16th, 1822. Before the commission issued J. Buckmaster was indebted on his separate account to his solicitor Watson. The two partners were also indebted upon their joint account to Watson. Subsequently to the issuing of the commission, Watson having in his possession two leases belonging to John Buckmaster's separate estate, and believing that if he sued the bankrupt and obtained judgment, the sheriff might sell the leases under the execution, brought two actions, one against John Buckmaster for the amount of his separate bill of costs, and another action against the two partners for the amount of the bill of costs due on the joint account, and recovered the amount of those bills respectively. The taxed costs of these actions amounted to 47l., and the assignees having demanded the leases, Watson refused to deliver them up until the amount of the two bills as well as the taxed costs of the two actions were paid. It appeared that the solicitor to the assignees had had notice from Watson that he should bring actions against the bankrupts, unless the amount of his bills were paid. A rule had been obtained, calling upon [*617] him to deliver up the deeds and papers upon payment of the amount of his bills only.

Hutchinson showed cause. It is quite clear, that if the action was brought with the knowledge of the assignees that they must be liable for the costs, and it appears that the solicitor to the assignees was informed, that unless the bills were paid, an action would be commenced. The assignees have no better claim than the bankrupt himself would have had if there had not been any bankruptcy. Now, he could not have had any right to his papers without paying the costs of the action on the bills. If the assignees in this case had offered to pay the bills of costs when they ought to have done it, there would have been no ground for this application.

Comyn, contra. The assignees are not liable for any debt incurred by the bankrupt subsequently to the issuing of the commission. Now the costs of the two actions were a debt incurred after the commission had issued. The right of acquiring the lien as against the bankrupt ended at the time when the commission issued. [BAYLEY, J. Suppose a mortgagor had become bankrupt, and the mortgagee to have brought an ejectment to recover possession of the premises, could the assignees of the bankrupt redeem without paying the costs of the ejectment?] The mortgagee has the legal title, but the person claiming a lien has only an equitable title.

ABBOTT, C. J. I think the solicitor had the same right of lien against the assignees that he had against the bankrupts. Now it is quite clear, [*618] that as against them his lien would have extended to the costs of the two actions, and I think that he has a lien to that extent in this case against the

assignees, unless it could be shown that he, as an attorney of this court, had improperly commenced the action. If, indeed, the debt had been tendered before the action was brought, that might have formed an answer to this claim for the costs of the actions, inasmuch as it would have been a defence to the action itself.

Rule absolute upon payment of the debt and costs
in the actions, and costs of the application.

The KING v. COOKE.

The Court will not, upon motion, quash a bad plea in abatement.

To an indictment for a conspiracy the defendant pleaded the following plea. "And Richard Stafford Cooke, Lord Stafford, Baron Stafford, who is indicted by the name of Richard Stafford Cooke, late of the parish of Castle Church, in the county of Stafford, gentleman, in his own person comes, and having heard the said indictment read, prays judgment of the said indictment, because he says that on the day of taking the inquisition aforesaid, and long before he was, and from thence hitherto hath been, and still is, Lord Stafford Baron Stafford, and the state, degree, title, and honour of Lord Stafford Baron Stafford, on the day of taking the inquisition aforesaid, and long before had and enjoyed, and still has and enjoys. And this, &c." A rule nisi had been obtained for quashing this plea, on "the ground that it was clearly bad, and pleaded for the purpose of delay."

Campbell now showed cause. The objection to the plea is, that the patent and pedigree is not set out. That may be cause of demurrer, but is no ground for quashing the plea. The defendant would thereby be deprived of the opportunity of discussing the validity of his plea upon a writ of error. In *Thomas v. Smithies*, 4 Taunt. 668, the Court refused to quash a plea in abatement, on the ground that it was insensible.

Scarlett and Talfourd, contra. In criminal proceedings it is discretionary in the Court either to quash a plea on motion or to leave the prosecutor to demur. That rule is laid down as to indictments in Comyn's Digest, tit. *Indictment*, letter H. [ABBOTT, C. J. There is a great difference between indictments and pleas in this respect. Have you any instance in which the Court have quashed such a plea?] In *Rez v. Grainger*, 3 Burr. 1617, the Court set aside a dilatory plea because it was not verified by affidavit.

Per Curiam. Then it was no plea at all, the statute of Anne requiring that such a plea should be verified by affidavit before it is received. It would be much too strong a measure to quash the plea in this case.

Rule discharged. (a)

(a) Upon the question, whether the plea was bad, the following authorities were cited: 2 Hale's P. C. 240; Co. Litt. 16 b, and note 3; *Countess of Rutland's case*, 6 Coke, 53; *Rez v. Knowles*, 1 Ld. Raym. 10.

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*LEWIS v. HARRIS.

A rule for setting aside an inquisition before the sheriff for excessive damages. The matter was referred, nothing being said about the costs of the application. The arbitrator by his award having reduced the damages, it was held, that the plaintiff was not entitled to the costs of the application.

Warrant of inquiry before sheriff. Rule obtained by defendant to set aside the inquisition for excessive damages. The amount was referred. Nothing was said about costs. The arbitrator reduced the damages by 50*l*. The master, on taxation of costs, refused to allow the plaintiff the costs of the rule to set aside

the inquisition. A rule nisi having been obtained for directing the master to review his taxation,

Maule showed cause, and contended, that as nothing was said about the costs at the time when the amount of damages was referred, each party ought to bear his own costs of the rule to set aside the inquisition.

Campbell, contra, contended, that they must be considered as costs in the cause, and that the plaintiff being entitled to costs generally, was entitled to those in dispute.

Per Curiam. You are asking to have the costs of a proceeding which terminated against you; which is not quite reasonable. If a plaintiff obtains a verdict and a new trial is granted, no stipulation being made about costs, although the plaintiff obtains a second verdict, he has the costs of one trial only.

Rule discharged.

*JOHNSON v. STANTON.

[*621]

A judge's certificate, under stat. 22 & 23 Car. 2, c. 9, may be granted within a reasonable time after the trial.

THIS was an action for an assault and battery tried before HULLOCK, B., at the last assizes for Shrewsbury, and the jury found a verdict for the plaintiff, damages one farthing. Four days after the trial, but before the judge had left the assize town, the judge, in order to give the plaintiff his costs, certified that an actual battery had been proved; and the master allowed the plaintiff his full costs upon taxation. A rule nisi had been obtained by *W. E. Taunton*, for the master to review his taxation, on the ground that in order to entitle the plaintiff to costs, the judge should have certified at the trial. The words of the 22 & 23 Car. 2, c. 9, being "in all actions of assault and battery, wherein the judge at the trial of the cause shall not certify, &c.," the plaintiff shall not recover more costs than damages. Here the certificate was granted four days after, and not at the trial.

Campbell showed cause, and contended, that upon this statute the certificate might be granted at any time after the trial, and before final judgment.

Taunton, contra, argued that the words of the statute were imperative, that the judge should certify at the trial, and cited *Ford v. Parr*, 2 Wils. 21, which, though a case on the stat. 8 & 9 W. 3, c. 11, was in principle applicable to the construction of 22 & 23 Car. 2, c. 9.

Per Curiam. The words, "the judge at the trial of the cause," [*622] mean the judge who tried the cause; they cannot be expounded literally, because the certificate cannot be granted at the trial, but only after the trial when the jury have found their verdict. And this construction is the convenient one, as it conduces to the better administration of justice, that the judge should have time to consider of the certificate rather than to be under the necessity of deciding upon it at the instant.

Rule discharged.

DOE, on the Demise of REES, v. THOMAS.

Semble, that the Court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud and perjury.

IN this case an ejectment had been tried at the court of great sessions in the county of Glamorgan, Wales, and a verdict found for the defendant. A new ejectment having been brought in this court, a rule nisi had been obtained by the defendant to stay the proceedings until the costs of the former ejectment were paid,

Russell showed cause, upon affidavits stating circumstances to show that the former verdict had been obtained by fraud and perjury, and contended that, under such circumstances, the Court would not compel a party to pay the costs of a former ejectment before he had an opportunity of trying his right.

W. E. Taunton, contra, contended that this rule was a matter of course, and that the Court would not enter into the question upon affidavit, whether the *623] verdict was *obtained by fraud. That would have been the proper subject of a motion for a new trial.

Russell suggested that by the practice of the court of great sessions in Wales, the party was bound to move for a new trial within a very short time, and it appeared by the affidavits that that time had elapsed before it had been discovered that the verdict had been obtained by fraud and perjury.

Per Curiam. The rule to stay proceedings until the costs of a former ejectment are paid, is not inflexible; and if the fact was clearly made out that the verdict had been obtained by the means stated in the affidavits, the rule ought never to have been granted. The whole matter was referred to the master, to decide whether the lessor of the plaintiff should be at liberty to proceed to trial without paying the costs of the former ejectment, and upon his report the rule was afterwards made absolute.

*624]

*GAINSFORD v. CARROLL and Others.

In assumpsit for not delivering goods upon a given day, the true measure of damages is the difference between the contract price and that which goods of a similar quality and description bore, on or about the day when the goods ought to have been delivered.

ASSUMPSIT for the non-performance of three contracts entered into by the defendants with the plaintiff for the sale of fifty bales of bacon, to be shipped by them from Waterford, in the months of January, February, and March, 1823, respectively. The defendant suffered judgment by default, and upon the execution of the writ of inquiry in London, the secondary told the jury that they were at liberty to calculate the damages according to the price of bacon on the day when the inquiry was executed, and that the difference between that and the contract price ought to be the measure of damages. *Parke* had obtained a rule nisi for setting aside the inquiry on the ground that the plaintiff was only entitled to recover the difference between the contract price and the price which the article bore at or about the time when, by the terms of the contract, it ought to have been delivered. He cited *Leigh v. Paterson*, 8 Taunt. 540, in which the Court of C. P. intimated an opinion that the damages should be calculated according to the price of the day on which the contract ought to have been performed. This is different from the case of a loan of stock; there the lender, by the transfer deprives himself of the means of replacing the stock, he has not the money to go to market with, but in the case of a purchase of goods, the vendee is in possession of his money, and he has it in his power, as soon as the *625] *vendor has failed in the performance of the contract, to purchase other goods of the like quality and description, and it is his own fault if he does not do so.

Wilde, contra, contended that the rule which had been laid down, as to the measure of damages, for not replacing stock, applied to the present, and he cited *Stevens v. Johnson*, 2 East, 211, and *M^r Arthur v. Lord Seaforth*, 2 Taunt. 257.

Per Curiam. Those cases do not apply to the present. In the case of a loan of stock the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. Here the plaintiff had his money in his possession and he might have purchased other bacon of the like quality the very day after the contract was broken, and if he has sustained any loss,

by neglecting to do so, it is his own fault. We think that the under-sheriff ought to have told the jury that the damages should be calculated according to the price of the bacon at or about the day when the goods ought to have been delivered.

Rule absolute.

***COULSON, Assignee of the Sheriff of MIDDLESEX, v. HAMMON. [*626**

In an action by original, if the defendant does not appear the bail-bond is forfeited on the quarto die post, the other four days being allowed merely *ex gratia*; and therefore, where a commission of bankruptcy issued against one of the bail to the sheriff after the quarto die post, but within four days, it was held that the penalty of the bond was a debt provable under the commission, and therefore barred by the certificate.

In February, 1823, a testatum *capias* issued against one Joseph Brown, at the suit of the plaintiff, returnable in fifteen days of Easter, (13th April,) the 16th being the quarto die post; and the four days after the quarto die post expiring on the 20th. Brown was arrested, and the defendant became one of the bail to the sheriff, and executed a bail-bond for the appearance of Brown at the return of the writ. On the 19th April a commission of bankrupt issued against Hammon, and he was duly declared a bankrupt, and has since obtained his certificate. On the 24th of April the sheriff executed an assignment of the bail-bond to Coulson, and he commenced this action on the bail-bond against the defendant, and signed judgment for the want of a plea, and the defendant having been taken in execution on a *capias ad satisfaciendum* founded on this judgment, a rule nisi had been obtained for discharging him out of custody, on the ground that the cause of action had occurred before the date of the commission, the bail-bond being then forfeited, and that the debt was therefore provable under the commission, and barred by the certificate.

R. V. Richards showed cause. The bond was not forfeited on the 19th April, when the commission issued; for the defendant in the original action had four days after the quarto die post to put in bail. *Frampton v. Barber*, 4 T. R. 377.

*But the Court were clearly of opinion that the bail-bond was forfeited on the quarto die post, and said that the other four days were allowed [*627 merely *ex gratia*.

Rule absolute.

G. J. KAIN v. OLD and Others, Executors of W. DODDS.

Defendants' testator being sole owner of a ship, signed and delivered to the plaintiff, G. J. K., an instrument, describing the ship as copper bolted, (but not reciting the certificate of registry;) at the foot of which was written, "Sold the within-mentioned ship to G. J. K." He afterwards executed a bill of sale to the plaintiff in the usual form, which did not describe the ship as copper bolted. She was not copper bolted, and plaintiff declared in *assumpsit* against the defendants (as executors of the vendor,) for the breach of his warranty in that particular: *Held*, that the action could not be maintained, the instrument first mentioned being void by the 34 G. 3, c. 68, s. 14.

THIS was an action of *assumpsit*, in which the now plaintiff, George Joseph Kain, declared that in the lifetime of the said William Dodds, in consideration that Kain would buy from Dodds a certain vessel, to wit, the *Snow Fortitude*, at the price of 1650*l.*, to be therefore paid by Kain to W. Dodds, he (Dodds) had undertaken and faithfully promised Kain that the said vessel was then copper bolted; Kain averred, first, that he, confiding in the promise of Dodds, had afterwards bought the said vessel of Dodds, and had paid to Dodds the price thereof; and the said G. J. Kain further confiding as aforesaid, afterwards, and after the death of the said W. Dodds, sold the said vessel to one James Shepherd, and upon such sale he, G. J. Kain, had warranted the vessel to be copper

fastened. And the said G. J. Kain further said, that at the time of the making of the promise of W. Dodds in that behalf, and at the time of the said sale, the said vessel was not copper bolted, by means whereof the said vessel had become and was of little value to G. J. Kain; and by reason thereof J. Shepherd *628] had impleaded Kain in a certain action on the case for damages sustained by Shepherd on occasion of the breach of the said warranty, and that such proceedings had been thereupon had in the said action, that Kain had been forced and compelled to pay, and had necessarily paid a large sum of money, to wit, 1000*l.*, in satisfaction of the damages and costs recovered against him by the said J. Shepherd in that action, and in payment of the costs necessarily incurred by G. J. Kain in and about his defence to the said action, and concluded to the damage of the said G. J. Kain of 2000*l.* At the trial before Abbott, C. J., at the London sittings after Trinity term, 1822, a verdict was found for the plaintiff, damages 783*l.* 5*s.* 6*d.*, subject to the opinion of the Court upon the following case. On the 25th October, 1816, the testator being sole owner of a ship called the Fortitude, signed and delivered to the said G. J. Kain an instrument, of which the following is a copy: "For sale or charter, one boom main sail, one lower steering sail, one middle stay sail, and one top gallant stay sail. The Snow Fortitude, A 1, British built, copper bolted, and new coppered in 1813, admeasures per register two hundred and seventy-seven tons, is well calculated for any trade where a vessel of her dimensions is wanted, lying in the Surrey canal. Inventory (here followed an inventory of stores, &c.) Sold the within-mentioned ship to Messrs. Kain and Son, (thereby meaning G. J. Kain.) W. Dodds." On the 28th October, 1816, the testator received the said 1650*l.*, and duly executed a bill of sale of the said ship to the said G. J. Kain, containing the usual covenants, but which did not describe the Fortitude as copper bolted. On the 14th September, 1818, Kain having expended a considerable sum of money upon the Fortitude, agreed to sell her to *629] J. Shepherd, according to printed particulars, substantially the same as those already set out. At the foot of those particulars, G. J. Kain wrote "I agree to sell Mr. Shepherd the Fortitude, with all her stores, as per inventory, for the sum of 2300*l.* G. J. Kain." The Fortitude was conveyed by G. J. Kain to J. Shepherd by bill of sale, in the same form as that by which she had been conveyed by testator to G. J. Kain. In Hilary term, 1821, J. Shepherd commenced an action upon the case against G. J. Kain in the Court of King's Bench in respect of the said last-mentioned sale, and declared upon a warranty that the vessel was copper fastened, and there was a count for a deceitful representation that she was copper fastened. Upon the trial of that action, the jury found a verdict for Shepherd, damages 500*l.*, which, together with 142*l.* 10*s.* taxed costs, were paid by Kain to Shepherd before the commencement of this action. Kain's own costs in that action amounted to 140*l.* 15*s.* 6*d.*, and make together with the former sums the aggregate sum of 783*l.* 5*s.* 6*d.* Kain gave no notice of the action of *Shepherd v. Kain* to Dodds or his executors. At the time of the sale of the ship by W. Dodds to Kain, the ship was not copper bolted. The case was argued at the sittings in banc after last Hilary term, and again in Trinity term, by

Manning, for the plaintiff. The objection on the part of the defendant rests on two cases, *Biddell v. Leader*, 1 B. & C. 327, and *Pickering v. Dowson*, 4 Taunt. 779; but they are both distinguishable from the present. The former *630] turned upon the register act, 34 G. 3, c. 68, s. 14; but in that case there were words of present sale; here the instrument contains no such words; *Biddell v. Leader* is therefore inapplicable. In *Pickering v. Dowson* it does not appear to have occurred either to the court or counsel, that an action could not be maintained on such an instrument as this; it turned entirely upon the attempt to travel out of the written agreement. It may be true, that the register act prevents this instrument from operating as an agreement, but it

was a representation in writing, upon which a transfer was afterwards made. [BEST, J. If it be a mere representation, where is there a warranty to bind the vendor's executors?] The transfer having been made in consequence of the representation, a promise that it was a true representation must be implied. *Meyer v. Everth*, 4 Campb. 22, proceeded on the ground, that parol evidence of a representation could not be received, where the contract was reduced into writing. To decide with the plaintiff here will not interfere with the policy of the register acts, which were only intended to make known the equitable as well as legal owners of ships. The instrument may be void as a transfer or agreement to transfer for want of a recital of the certificate of registry, but it may still be binding as a representation. If it be held void to all intents and purposes, *Kerrison v. Cole*, 8 East, 231, cannot be law. *Wigglesworth v. Dallison*, Doug. 201, shows, that even where a deed is executed, a collateral understanding between the parties may be shown by the custom of the country, and that evidence of an express stipulation is not necessary. There the custom was held to be evidence of the bargain between the parties, so here the representation is evidence of a warranty by the vendor that the ship was copper fastened. The bill of sale in this case was not the agreement between the parties, but the completion of the agreement; the language was of one party only, and the covenants were merely such as the law would imply if not expressed. *Hodges v. Drakeford*, 1 N. R. 270; *Baker v. Paine*, 1 Ves. sen. 456. Under such circumstances other evidence of the agreement between parties may be admitted. *Jeffery v. Walton*, 1 Stark. 267.

Campbell, contra. This was an action of contract, and it was necessary to prove the consideration and promise laid in the declaration. The agreement in question was offered as proof of the promise, but that agreement is made void by the 34 G. 3, c. 68, s. 14. It is immaterial whether it be a transfer or an agreement for a transfer, for it contains no such recital as required by that statute. This was decided by *Brewster v. Clarke*, 2 Mer. 75, and *Biddell v. Leader*, which are not to be distinguished from the present case. It cannot then operate as a contract. But it is said, that it may nevertheless operate as a representation, and therefore be evidence of a contract. But the statute says that such an instrument shall not be valid for any purpose, how then can it prove a contract? But admitting it to be a representation, still, not being introduced into the subsequent contract, it is not binding. Where the whole contract is by parol, all that passes may possibly be taken as part of it; but it is otherwise where the contract is reduced into writing. *Countess of Rutland's case*, 5 Co. 26; *Meyer v. Everth*, 4 Campb. 22; *Gardiner v. Gray*, 4 Campb. 144; *Powell v. Edmunds*, 12 East, 6; *Hope v. Atkins*, 1 Price, 143; *Pickering v. Dowson*, *Lano v. Neale*, 2 Stark. 105. If the representation were fraudulent it might perhaps have been the ground of an action *ex delicto* against the vendor, but cannot be considered as a part of the contract, so as to sustain this action of assumpsit against his representatives.

Manning, in reply. The *Countess of Rutland's case* and the other cases cited, are applicable to parol evidence only, here the representation was reduced into writing, and is not therefore liable to the objection, that it is dangerous to admit evidence depending upon memory alone, to vary a contract which has been reduced into writing. *Cur. adv. vult.*

ABBOTT, C. J., now delivered the judgment of the Court.

This is an action of assumpsit, brought for the recovery of damages for the breach of an alleged contract. The declaration alleges that, in consideration that the plaintiff would buy of the defendant's testator a certain ship at a price mentioned, the testator promised that the ship was copper bolted; that relying on that promise, the plaintiff bought the ship and paid the price; that he afterwards sold the ship to one Shepherd, and on that sale warranted the ship to be copper fastened; that the ship was not copper bolted; that Shepherd brought

an action against him on his warranty, and recovered damages and costs. At the trial before me it was found, that the defendant's testator being sole owner *633] of the ship, signed and delivered to the plaintiff an instrument describing the ship as copper bolted, and containing an inventory of stores; at the foot of which was written, "Sold the within mentioned ship to Messrs. Kain and Son, W. Dodds." And it was further found that the testator received the sum of 1650*l.*, and executed a bill of sale of the ship to Kain. That bill of sale was in the usual form, and contained a recital of the certificate of registry, but it did not describe the vessel as copper bolted. It was further found that Kain resold the ship to Shepherd, according to printed particulars similar to those before mentioned, and executed to him a bill of sale similar to that which was executed by the testator; that Shepherd brought an action on the case against him on his warranty, that the ship was copper fastened, and recovered.

Upon this case the question is, whether the plaintiff has proved a promise according to his declaration. We think he has not. The first instrument, which contains a description of the ship as copper bolted, and an inventory of her furniture, and concludes with the words, "Sold the within-mentioned ship to Messrs. Kain and Son, W. Dodds" cannot in our opinion be regarded as an instrument of contract. It is invalid either as a conveyance or as an agreement to convey the ship, by the register acts, because it does not contain a recital of the certificate of registry, *Biddell v. Leader*, 1 B. & C. 327. And it is imperfect as an instrument of contract, because it does not mention the price, and this defect is not supplied by any fact appearing in the case; for there is no mention of any price as agreed between *the parties before or at the time *634] when Dodds the testator delivered the paper to the plaintiff: and the bill of sale mentions the sum of 1650*l.* as the consideration of the sale, but does not mention any prior contract or agreement. We do not, however, rely on this imperfection, the objection arising out of the register act being decisive as to the invalidity of the paper. The bill of sale then is the only instrument of contract, and this does not describe the ship as copper bolted; though it contains covenants for the title and for further assurance. The description of copper bolted in the paper can therefore be considered as a representation only, and not as any part of the contract. The contract is in writing, as every contract for the sale of a ship must be.

Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract. A matter antecedent to and dehors the writing, may in some cases be received in evidence, as showing the inducement to the contract; such as a representation of some particular quality or incident to the thing sold. But the buyer is not at liberty to show such a representation, unless he can also show that the seller by some fraud prevented him from discovering a fault which he, the seller, knew to exist. All this is very clearly laid down in the judgment delivered by the late Lord Chief Justice GIBBS in *Pickering v. Dawson*, and it is decisive of the present case wherein the plaintiff has neither declared *635] upon, nor proved fraud on the part of the defendant's testator, but has declared upon a promise or contract. The postea therefore, is to be delivered to the defendant.

Judgment for the defendant.

2 A

FOX v The Bishop of CHESTER, in Error.

Where a contract was made for the sale of a next presentation, the parties at the time knowing the incumbent to be at the point of death and expecting an immediate vacancy: *Held*, that the contract was simoniacal, and the presentation made in pursuance of it by the purchaser, void, although the clerk presented was not privy to the transaction, and the contract was not entered into with a view to the presentation of any particular person.

QUARE impedit. The declaration stated that the Bishop of Chester was attached, to answer E. V. Fox in a plea, that he permit the said E. V. to present a fit person to the church of Wilmslow, in the county of Chester. The first count stated that the advowson of the rectory of the church of Wilmslow was appurtenant to the manor of Bollyn, and set out specially the title of Thomas Joseph Trafford to the manor, with the appurtenances for life, and showed, that J. Bradshaw, the last incumbent, was presented by virtue of a grant of the next avoidance made by T. Trafford, through whom T. J. Trafford claimed; and then proceeded, "And the said T. J. Trafford being so seised thereof, afterwards, to wit, on the 12th day of November, 1819, at, &c. (the said church being then and there full of the said J. Bradshaw, the then incumbent thereof) by a certain indenture then and there made between T. J. Trafford of the one part and plaintiff of the other part (which plaintiff brings into court sealed, &c.,) he the said T. J. Trafford, for the consideration therein mentioned, did grant, bargain, sell, and demise unto plaintiff, his executors, &c., all that the said advowson, donation, right of patronage, presentation, and free disposition of, *in, and to the said rectory and parish church of Wilmslow, in the county palatine of Chester, with the rights, members, and appurtenances [*636 thereunto belonging, habendum to the said plaintiff, his executors, &c., for ninety-nine years, if the said T. J. Trafford should so long live. By virtue of which said last-mentioned indenture the said plaintiff then and there became and was possessed of the said advowson of and in the said rectory, as in gross by itself for the said term, so to him thereof granted. Averment, that T. J. Trafford is still living, and that after the making of the indenture, and whilst plaintiff was possessed of the advowson, to wit, on, &c., the said church became vacant by the death of the said J. Bradshaw, the last incumbent thereof, whereby it then belonged and now belongs to the plaintiff, to present a fit person to the said church so being vacant; but the said bishop unjustly hinders him from so doing. There was a second count setting out a title to the advowson in gross, and omitting all mention of the manor; in all other respects it was similar to the first. The defendant craved oyer of the indenture made between plaintiff and Trafford, whereby it was witnessed, that, in consideration of 6000*l.* paid to Trafford by the plaintiff, the former had granted, bargained, sold, and demised, and by the said indenture did grant, &c., all that the advowson, donation, right of patronage, presentation, and free disposition of, in, and to the rectory and parish church of Wilmslow, with the rights, members, and appurtenances thereunto belonging, habendum for ninety-nine years, if Trafford should so long live. And Trafford covenanted that he had good right to grant and demise the advowson, &c., and that he would indemnify plaintiff against all manner of right, title, claim, *and demand whatsoever, which the [*637 chancellor and scholars of the University of Cambridge might have or claim in the said advowson, &c., during the said term of ninety-nine years, and against all right, claim, &c., which any person thereafter presented or nominated to the said parish church of Wilmslow by the said chancellor and scholars might have or claim thereto by virtue or colour of such presentation or nomination, and against all costs and expenses which plaintiff might be put to by reason of any such title or claim. There was then a covenant for further assurance, followed by this proviso: "provided always, and it is hereby declared and agreed, by and between the said parties hereto, that when and so soon as

he the said E. V. Fox, his executors, &c., shall have presented to the said rectory or church of Winslow, by reason of the same having become vacant or void by the death, resignation, deprivation, eviction, promotion, or cession of J. Bradshaw, the present incumbent, or otherwise, or through the wilful neglect or default of him the said E. V. Fox, his executors, &c., the said rectory or church shall have been suffered, as to the presentation or right of presentation thereto, to lapse, he the said E. V. Fox, his executors, &c., shall and will, at any time or times thereafter, at the request and proper costs and charges of the said T. J. Trafford, or such person as he shall appoint, reassign the said advowson to him the said T. J. Trafford, or such person as aforesaid, for all the residue which shall be then unexpired of the said term of ninety-nine years, free from all encumbrances, by the said E. V. Fox, his executors, &c.” He then craved oyer of the indenture in the second count mentioned, which was declared to be in the same words as the indenture in the first count, and therefore

*638] not set out on the record. He then pleaded *actio non*, because the said T. J. Trafford did not grant, bargain, sell, and demise unto the said plaintiff, his executors, &c., the said advowson, &c., in the first count of the declaration mentioned, in manner and form as plaintiff hath in that count alleged and concluded to the country: to which the similiter was added by plaintiff. Similar plea to the second count. The third plea, which was pleaded to both counts, averred the identity of the indenture set out in the first count with that set out in the last count, and then proceeded: “And the said bishop further saith, that the said indenture was made after the said church became vacant, as in the declaration mentioned, by the death of the said J. Bradshaw, the said incumbent thereof, and that Trafford, after the church became vacant, by the indenture granted, bargained, sold, and demised, unto the plaintiff, his executors, &c., the said advowson, &c., of, in, and to the said rectory and parish church of Wilmslow; without this, that Trafford, whilst the said church was full of the said J. Bradshaw, the incumbent thereof, did grant, &c., unto the plaintiff, his executors, &c., the said advowson, &c., of, in, and to the said rectory, &c., in the declaration mentioned, as the plaintiff hath in his said declaration alleged, which defendant is ready to verify. The fourth plea, after averring the identity of the parish church of Wilmslow, the advowson, &c., the indenture made between plaintiff and Trafford, and the disturbance by defendant, mentioned in the two counts of the declaration (which averments were repeated in each subsequent plea) proceeded: “And the said bishop further saith, that the said church of Wilmslow is within his diocese of Chester, and a benefice with cure of souls, and that whilst the

*639] said T. J. Trafford was so seized of the said manor, to which, &c., with the appurtenances, and of the said advowson, as in the said declaration mentioned, and before the making of the corrupt simoniacal and unlawful agreement in this plea after mentioned, to wit, on the 11th day of November, in the year of our Lord, 1819, the said J. Bradshaw then being the incumbent of, and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, to wit, at, &c., whereof, as well the said E. V. Fox and T. J. Trafford as one George Uppleby, clerk, in this plea after mentioned, to wit, on, &c., and also at the time of making the corrupt, simoniacal, and unlawful agreement, in this plea after mentioned, there had notice. And the said bishop further says, that whilst the said T. J. Trafford was so seized of the said manor, to which, &c., with the appurtenances, and of the said advowson as aforesaid, and whilst the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid, was so afflicted and in such danger, state, and condition as aforesaid, to wit, on, &c., at, &c., they the said T. J. Trafford, E. V. Fox, and George Uppleby, and each of them, then and there, well knowing the premises, and believing and expecting that the death of the said J. Bradshaw of the mortal disease aforesaid

was then and there fast approaching, and that by means of the death of the said J. Bradshaw the said church would forthwith become vacant, it was in such belief and expectation corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, agreed by and between the said T. J. Trafford and the said E. V. Fox, with the knowledge of the said G. Uppleby, that the said E. V. Fox should pay *to the said T. J. Trafford [*640 a sum of money, to wit, the sum of 6000*l.*, and that the said T. J. Trafford, in consideration thereof, should grant, bargain, and sell to the said E. V. Fox the next presentation to the said church; *and that, in order to make such grant, bargain, and sale, and as a means of making such grant, bargain, and sale to the said E. V. Fox of the next presentation to the said church, and as a shift, contrivance, and device to evade and elude the making such grant, bargain, and sale as a mere grant, bargain, and sale to the said E. V. Fox of the next presentation to the said church in express terms the said indenture, in the said declaration mentioned to have been made between the said T. J. Trafford and the said E. V. Fox, should be made, and that the said T. J. Trafford should seal, and as his act and deed deliver the said indenture.* And the said bishop further says, that afterwards, and whilst the said T. J. Trafford was so seised of the said manor, to which, &c., with the appurtenances, and of the said advowson, and whilst the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on the 12th day of November, in the year of our Lord, 1819, to wit, at, &c., in pursuance, furtherance, and performance of the said corrupt, simoniacal, and unlawful agreement, and in order to make such grant, bargain, and sale of the next presentation to the said church, *and as a means of making such grant, bargain, and sale by the said T. J. Trafford to the said E. V. Fox of the next presentation to the said church, and as a shift, contrivance, and device to evade and elude the making such grant, bargain, and sale as a mere grant, bargain, and sale to the said E. V. Fox of the next presentation to the said church in express terms,* *the said indenture in the said declaration mentioned to have been made [*641 between the said T. J. Trafford and the said E. V. Fox was made, and the said T. J. Trafford did then and there seal, and as his act and deed deliver the said indenture. And the said bishop further says, that the said J. Bradshaw so being the incumbent of and filling the said church as aforesaid, remained and continued so afflicted as aforesaid, and in such danger, state, and condition as aforesaid, from the time in that respect in this plea above mentioned, until the time of his death, and that afterwards, to wit, on the 12th day of November, 1819, Bradshaw, so being the incumbent of and filling the said church as aforesaid, of the disease aforesaid died, to wit, at, &c., and by means thereof the said church then and there became and was vacant: and the said bishop further says, that by reason of the premises and by force of the statute in such case made and provided, the said last-mentioned indenture became, and was, and is utterly void, frustrate, and of no effect in law, and wholly inoperative to grant, pass, or convey any estate, right, title, or interest in the said advowson, or any presentation, or any right of presentation to the said church to the said E. V. Fox. And the said bishop further says, that afterwards, to wit, on the 30th day of December, 1819, at, &c., the said E. V. Fox, under colour and by pretence and means of the said last-mentioned indenture, so made as aforesaid, in pursuance of the said corrupt, simoniacal, and unlawful agreement, did corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, present the said G. Uppleby, clerk to the said bishop, to be admitted, instituted, and inducted into the *said church of Wilmslow, to wit, at, &c. But the said bishop further says, that by reason of the pre- [*642 mises, and by force of the statute in such case made and provided, the said presentation of the said G. Uppleby, by the said E. V. Fox, so made as aforesaid,

became, and was, and is utterly void, frustrate, and of no effect in law, and the said bishop, by reason thereof, did not, nor could admit, institute or induct, nor by law ought to have admitted, instituted, or inducted, nor yet by law ought to admit, institute, or induct the said G. Uppleby into the said church upon or by virtue of that presentation, which is the same hinderance and disturbance, &c., whereof the said E. V. Fox hath above complained. The fifth plea was like the fourth, omitting the parts in italics. The sixth plea varied from the fourth only by omitting to state that Uppleby had notice of the several matters as well as plaintiff and Trafford. The seventh plea varied from the fifth in the same manner. The eighth plea alleged that the said church of Wilmslow is within defendant's diocese of Chester, and a benefice with cure of souls, and that whilst the said T. J. Trafford was so seised of the said manor, to which, &c. with the appurtenances, and of the said advowson, as in the said declaration mentioned, and before the making of the corrupt, simoniacal, and unlawful agreement in this plea after mentioned, to wit, on the 11th day of November, 1819, the said J. Bradshaw, then being the incumbent of and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, to wit, at, &c., whereof the said E. V. Fox and T. J. Trafford, to wit, on, &c., and also at the time of making the corrupt, simoniacal, and unlawful agreement in this plea after mentioned, there had notice. And the said bishop further says, that whilst the said T. J. Trafford was so seised of the said manor, to which, &c., with the appurtenances and of the said advowson as aforesaid, and whilst the said J. Bradshaw, so being the incumbent, and filling the said church as aforesaid, was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on, &c. at, &c. they the said T. J. Trafford and E. V. Fox, and each of them, then and there well knowing the premises, and believing and expecting that the death of the said J. Bradshaw, of the mortal disease aforesaid, was then and there fast approaching; and that by means of the death of the said J. Bradshaw the said church would forthwith become vacant; it was in such belief and expectation corruptly, simoniacally, and unlawfully, and against the force of the statute in such case made and provided, agreed by and between the said T. J. Trafford and the said E. V. Fox, that, in consideration of a large sum of money, to wit, the sum of 6000*l.* to be therefore paid by the said E. V. Fox to the said T. J. Trafford, the said indenture in the said first count of the said declaration mentioned to have been made between the said T. J. Trafford and the said E. V. Fox, should be made; and that the said T. J. Trafford should seal, and as his act and deed deliver the said indenture. And the said bishop further says, that afterwards, and whilst the said T. J. Trafford was so seised of the said manor, to which, &c., with the appurtenances, and of the said advowson, and whilst the said J. Bradshaw so being incumbent of and filling the said church as aforesaid, was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on the 12th day of November, in the year of our Lord 1819, at, &c. in pursuance, furtherance, and performance of the said corrupt, simoniacal, and unlawful agreement, the said indenture in the said first count of the said declaration mentioned to have been made between the said T. J. Trafford and the said E. V. Fox was made; and the said T. J. Trafford did seal, and as his act and deed deliver the said indenture. The ninth plea, after stating the illness of the incumbent, and that plaintiff and Trafford had notice of it, alleged the corrupt and simoniacal agreement to have been, that Trafford should, "in consideration of money, grant, bargain, and sell to the plaintiff the next presentation to the said church," and averred that the indenture in the declaration mentioned was made in pursuance of that agreement, and concluded as the eighth plea. The tenth plea, after the same introduction, alleged, that plaintiff and Trafford well knowing the premises, and believing and expecting that the death of the said J. Bradshaw, of the mortal disease aforesaid, was fast approach-

ing, and that by means of his death the said church would forthwith become vacant; and the said plaintiff intending to present the said G. Uppleby to be admitted, instituted, and inducted, into the said church of Wilmslow, when the same should, by the death of Bradshaw, next become vacant; it was then and there corruptly, &c. agreed between Trafford and the plaintiff, that the plaintiff should pay to Trafford 6000*l.*, and that he, in consideration thereof, should grant, &c. to the plaintiff the next presentation to the said church, the said plaintiff then and there intending to present the said G. Uppleby. The plea then alleged that in pursuance of that agreement, and in order to make such bargain and *sale of the next presentation the indenture in the declaration mentioned was executed by Trafford, and that the plaintiff accepted and received it with intent to present Uppleby, and concluded as the former pleas. [*645

The eleventh plea, after the same introductory matter as in the ninth, alleged, that it was corruptly, &c. agreed between the plaintiff and Trafford, "that the indenture mentioned in the declaration, should be made, and that it was made in pursuance of that agreement." The twelfth plea varied from the eleventh only by omitting to allege that the plaintiff and Trafford knew of the incumbent's dangerous illness. The thirteenth plea, after the averment of identity, without mentioning Bradshaw, alleged, that whilst Trafford was seised of the manor and advowson, it was corruptly, &c. agreed between him and the plaintiff that the indenture in the declaration mentioned should be made, and that it was made and executed in pursuance of that agreement. The fourteenth plea, after the same introduction, stated that whilst Trafford was seised of the manor and advowson, and before the making of the said simoniacal and corrupt agreement in this plea after mentioned, to wit, on, &c. and after the death of the said Bradshaw, the said last incumbent of the said church; and after the church became vacant by the death of Bradshaw, and whilst it remained and was vacant, to wit, on, &c. it was corruptly, &c. agreed by and between Trafford and the plaintiff that Trafford should, in consideration of 6000*l.* to be paid by the plaintiff to him, grant, bargain, and sell to the plaintiff the next presentation to the said church, and that the indenture before mentioned was made and executed in pursuance of that agreement. The fifteenth plea was similar to the fourteenth, except *as to the corrupt agreement, which it alleged to be that the indenture in the declaration mentioned should be made, and averred [*646

that it was made and executed in pursuance of that agreement. Replication to the third plea, that Trafford, whilst the church was full of Bradshaw the incumbent thereof, did grant, bargain, &c. the advowson, &c. to the plaintiff as alleged in the declaration. To the fourth, that it was not corruptly, &c. agreed by and between plaintiff and Trafford with the knowledge of Uppleby, as in that plea alleged. Similar replication to the fifth plea. Replication to each of the other pleas, denying that it was corruptly, &c. agreed as in those pleas alleged. At the trial before WARREN, C. J., of Chester, and Marshall, Serjt., at the Chester Spring assizes, 1821, the jury found a special verdict, in substance as follows: first, they found the identity of the several matters alleged in the two counts of the declaration as averred in the pleas; and then, that before and on the 12th day of November, 1819, the said T. J. Trafford was seised of the manor and advowson within mentioned, and that before and on the said 12th day of November, 1819, the within named J. Bradshaw was the incumbent of the church in the pleadings mentioned, and that the said church was then full of the said J. Bradshaw, to wit, at, &c.; and that J. Bradshaw so then being such incumbent of and filling the said church, was before and upon the said 12th of November, 1819, afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then greatly despaired of, and that he was and continued to be so afflicted with such mortal disease and in extreme danger of his life, and his life was and continued to be greatly despaired of until the *time of his death; and that J. Bradshaw, so being such incumbent, died of the said mortal disease at half past eleven o'clock at [*647

night of the same 12th day of November, 1819, to wit, at, &c.; that on the said 12th day of November, 1819, at ten minutes before three o'clock in the afternoon of the same day, and whilst the said J. Bradshaw was such incumbent as aforesaid, an agreement was made and concluded between the said T. J. Trafford, so being seised of the said manor and advowson as aforesaid, and the said E. V. Fox for the sale by the said T. J. Trafford to the said E. V. Fox of the next turn or presentation of the said church, for and in consideration of 6000*l.*; that on the said 12th day of November, 1819, and immediately after the making of such agreement, they, the said T. J. Trafford and E. V. Fox, in pursuance of such agreement, and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within-mentioned indenture, bearing date the 12th day of November, 1819, and of which said indenture the said bishop hath within had oyer, and which is within set forth upon such oyer thereof, to wit, at, &c.; that the said agreement was made, and the said indenture was sealed and delivered in the lifetime of J. Bradshaw, and he, at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, was afflicted with the said mortal disease and in extreme danger of his life, and that his life was thereby then greatly despaired of; and that the said T. J. Trafford and the said E. V. Fox, at the time of making the said agreement, and also at the time of sealing

*648] and delivering the said indenture, well knew and believed that the said *J. Bradshaw was afflicted with the said mortal disease, and was in extreme danger of his life, and that his life was thereby then greatly despaired of, to wit, at, &c. aforesaid; that the said agreement was made and concluded, and the said indenture was sealed and delivered, without any knowledge or privy whatsoever of the said G. Uppleby, and without any intention to present the said G. Uppleby to the said church when it should become vacant. But whether or not, upon the whole matters aforesaid by the jurors aforesaid in form aforesaid found, the said T. J. Trafford did grant, bargain, sell, and demise unto the said plaintiff, his executors, administrators, and assigns, the advowson, donation, right of patronage, presentation, and free disposition of, in, and to the within named church in the pleadings within mentioned, with the rights, members, and appurtenances thereunto belonging, in manner and form as the said plaintiff hath in the first and last counts of the declaration, or either of those counts, in that behalf alleged, or in manner and form as is stated in the oyer of the said indenture within set forth, the jurors aforesaid are altogether ignorant. And whether or not, upon the whole matters aforesaid in form aforesaid found, the said T. J. Trafford, whilst the said church was full of the said J. Bradshaw, being the incumbent thereof, did grant, bargain, sell, and demise unto the said plaintiff, &c. the said advowson, donation, right of patronage, presentation, and free disposition of, in, and to the church in the pleadings within mentioned, with the rights, members, and appurtenances thereunto belonging, in manner and form as the said plaintiff hath in the declaration in that behalf alleged, or in

*649] manner and form as is stated in the oyer of the said indenture *within set forth, the jurors aforesaid are altogether ignorant. And whether or not, upon the whole matters aforesaid by the jurors aforesaid in form aforesaid found, it was corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, agreed by and between the said T. J. Trafford and the said plaintiff, in manner and form as the said defendant hath above in his within mentioned fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth pleas, or any of them alleged, the jurors aforesaid are altogether ignorant, and thereupon they pray the advice of the said justices here. And if, &c. (in the common form.) Upon this special verdict judgment was given for the defendant in the court below; whereupon the plaintiff brought a writ of error, and assigned the common errors. The case was argued in last Trinity term by

Parke, for the plaintiff in error. The simple question for the Court is, whether the sale of a next presentation, the incumbent being in extremis, be or be not simoniacal, the purchase not having been made with a view to the nomination of any particular person. There is neither principle nor authority for saying that such a contract is simoniacal. *Barret v. Glubb*, 2 W. Bl. 1052, is expressly in point for the plaintiff. There an advowson was brought by Barret, he having notice that, at the time the then incumbent was in extremis, the question arose as to the next presentation, and it was held that Barret was entitled to it, the church not being actually void at the *time of the sale. [*650 That case is also reported from a MS. note in Bac. Abr., *Simony* (A.) It was much discussed in *Greenwood v. Bishop of London*, 1 Marsh, 292, and neither in that case, nor in any other does it appear that the propriety of the decision of the Court of C. P. has been doubted. If it was correct, this case must be governed by it, for it was in effect deciding that by such a contract all future presentations passed, and if the next presentation might pass, with others, why should it not pass alone? The Court below were of opinion that such would be the consequence, and therefore, in giving judgment for the defendant, said, that *Barret v. Glubb* was not correctly decided. The question turns upon the 31 Eliz. c. 6, s. 5, which was passed to prohibit patrons from making their selection of incumbents from improper or corrupt motives. The patron of the church for the time being cannot therefore take a reward for presenting. But the patron may lawfully be changed, and therefore, when the church is full, any portion of the patronage may lawfully be sold, and then the new patron cannot receive a reward for presenting. The right to convey the patronage exists to the last moment when the church is full. In Watson's Complete Incumbent, p. 32, the cases where the sale of a next presentation has been held bad are collected, and it appears that every one of them is clearly distinguishable from the present. In each of them the next presentation was conveyed as a cloak for a simoniacal contract, or the clerk purchased for himself, or the purchase was made with a view to the presentation of a particular person. The leading case on that subject is *Winchcombe v. The Bishop of Winchester and *Pulleston*, Hob. 165; Noy. 25, S. C. There the next turn was conveyed to Ebdon by the patron Waller, as a cover for a simoniacal contract between him and Say, the clerk. In *Kitchen v. Calvert*, Lane, 102, it is said, that "if A. buys the next presentation, intending to present B., and afterwards does present him, by averment and good pleading the presentment of B. shall be void." That shows, that in order to make the contract illegal, it must appear on the record that it was entered into with a view to present a particular person; and there the bargain was not made until the church was actually vacant. Here, by the special verdict it is expressly found, that Uppleby the clerk was not privy to the transaction, and that the plaintiff, Fox, did not make the purchase with a view to his presentation. The church was, in fact, full at the time when the contract was completed. Had the tenant for life of the advowson died under such circumstances, the next presentation would have gone to the remainder-man. The only question for the Court is, whether the incumbent was then still living. They cannot entertain any nice distinctions as to the probability of an early vacancy. After avoidance at common law the presentation could not be granted, it being then a fruit fallen and a mere personal privilege. *Brookesby's case*. (a) And that explains the decision in *Baker v. Rogers*, Cro. Eliz. 788. There the church was vacant when the bargain for the next presentation was made, but as that could not then be sold, the presentation by Baker the purchaser was in law the presentation of Broughton the owner of the *advowson; that was clearly simoniacal, for Baker had paid him 180*l.* for it. But as long as the church remains full that [*652 reasoning does not apply. In *Walker v. Hamersly*, Skin. 90; 3 Lev. 115, S.

(a) Cro. Eliz. 174; 1 Leon. 167; 3 Leon. 256; Dyer, 282, in margin, S. C.

C., the church was in law vacant, for the then incumbent was merely in by usurpation. This is not a case within the 31 Eliz. c. 6; and in *Bishop of St. David's v. Lucy*, 12 Mod. 237, Lord Holt says, that this Court cannot take notice of any offences as simoniacal, except those pointed out by that statute. In *Smith v. Shelburne*, Cro. Eliz. 685, see S. C. Moore, 916, it was held that the purchase of a next presentation, the incumbent being in extremis, was not void. [Best, J. That proceeded on the ground, that a father might make such a purchase to provide for a son, but that principle has since been denied.] The real objection since taken to *Smith v. Shelburne* is that which at the time was relied upon by ANDERSON, C. J., viz., that the purchase was made with the privity of the son who was to be presented. In Com. Dig., *Eglise*, (N 3,) it is cited as a contract made by the clerk, and in *Barret v. Glubb*, DE GREY, C. J., speaks of *Sheldon v. Brett*, 63, which will probably be cited for the other side, as the case of a bargain made with the privity of the clerk. Upon the whole, then, it appears that at common law the right of patronage may, during plenarty, be sold, although during vacancy it cannot; and there is not a single case wherein it has been held that a sale of patronage during plenarty is rendered void by the 31 Eliz. c. 6, where the contract was made without any intention on the part of the purchaser to present a particular person, and where the clerk presented was not in any way privy to the *trans-
 *653] action. Here, a negative of both those circumstances, being the strongest possible evidence of good faith in the transaction, and of the absence of corrupt motive, is found in the special verdict.

D. F. Jones, contra. It is not necessary to discuss on the one hand any of the cases where money was given by the clerk for the presentation, or where he was privy to the purchase, or on the other, those where the parties to the contract did not know that the incumbent was in extremis. The question here is, whether a grant of the next presentation, made for money, the parties knowing that the incumbent was in extremis, can be good although the clerk were not privy to the transaction. In all the cases where the sale of an advowson or presentation has been held good, the purchase has been effected with a view to have a property in the thing sold, and not merely a personal privilege. Now, here the church, although literally full, was in effect vacant. It was held very early, that by a grant of an advowson, the church being empty, the next presentation would not pass. *Jenk. 5 Cent.*, 236, c. 13; *Stephens v. Wall*, Dyer, 282 b; 1 And. 15. It would be void on the ground of public policy, even if no money passed. In some cases it is said to be void, because the sale is of a chose in action; in others because it is a personal trust. *Bishop of Lincoln v. Wolferston*, 3 Burr. 1504. [HOLROYD, J. It is then severed from the advowson and goes to the executor.] The only question is, whether it be necessary to show privity in the clerk. *Baker v. Rogers* shows, that under such circum-
 *654] stances the grant is void, although the clerk be not privy to the transaction, but he is not thereby subjected to the penalties of the statute, *Dr. Hutchinson's case*, 12 Co. 101, and 3 Inst. 154. In this case too, the sale was of the next turn only, and not of the advowson. The incumbent was not merely sick, but at the point of death, and the special verdict finds that he died six hours after the contract was made. Surely it would be a fraud upon the policy of the law to hold such a contract good. The policy of the law is to avoid the danger of a simoniacal presentation, and for that reason the purchase of the next turn has been held void when effected with a view to present a particular person, *Kitchen v. Calvert*, Lane, 102. The case of *Sheldon v. Brett* expressly decided that the grant of the next avoidance for money when the person was sick in his bed, ready to die, was simony; and although it is said by DE GREY, C. J., in *Barret v. Glubb*, that the clerk was privy, yet nothing of that kind is suggested in the report. The stat. 31 Eliz. c. 6, although penal, yet has received a liberal construction, in order to reach the evil for the remedy of which

it was passed. *Mackaller v. Todderick*, Cro. Car. 337, 353, 361. *Barret v. Glubb*, the only case which presses upon the defendant, is in some degree distinguishable; that was not the sale of the next turn alone, but of the advowson, and that after a long negotiation, which circumstances rebutted the idea that the bargain was made with a view to an immediate presentation. It may be asked at what period of the incumbent's life the right to dispose of the next turn ceases? It is unnecessary to determine that, for *wherever it appears [655] that the contract was made with a view to an immediate presentation, it is a fraud upon the policy of the law, and therefore void. *Cur. ad. vult.*

ABBOTT, C. J. In this case, we think the judgment of the Court below ought to be affirmed. Our judgment is founded upon the language of the statute 31 Eliz. c. 6, and the well known principle of law, that the provisions of an act of parliament shall not be evaded by shift or contrivance. The authorities quoted at the bar are, to a certain extent, conflicting, and not easily reconcilable with each other. The decision mentioned by HUTTON, J., as quoted in Winch. 63, might perhaps be a strong authority in favour of the defendant, if we were possessed of all the facts of the case, but unfortunately we are not. It is met too by the case of *Barret v. Glubb*, 2 W. Bl. 1052, which certainly contains the opinion of very learned judges in favour of the validity of the sale of the next turn, made when the death of the incumbent is expected speedily to take place. But that case has not the full weight of a judicial decision, because it does not appear to have been acted upon. For, upon reference to the minutes of the decree in the register book, it appears that the lord chancellor decreed a conveyance of the advowson, and gave costs to the plaintiffs, the purchaser and his clerk; but he did not decree an injunction to restrain the seller from prosecuting his quare impedit, which we think he would have done, if he had thought the purchaser entitled to the presentation, it being clear that the seller must prevail in the quare impedit, if permitted to prosecute it, because the *advowson had only been contracted for, and not actually conveyed before [656] the benefice became void; and if the lord chancellor had thought the purchaser entitled to the presentation, he should have ordered the seller to present the purchaser's nominee, as in the case of a mortgage, this being the only mode in which such nominee could be entitled to institution to the benefice. Further, it appears by the register's book, and also by the report in Dickens, that there had been a treaty for the purchase of the advowson of some continuance before the final close of the bargain, and it does not appear that the vendor knew of the incumbent's dangerous state when the contract was made. This treaty, however, was not mentioned in the case sent by the lord chancellor to the Court of Common Pleas. In the present case no antecedent treaty is found by the verdict, but the contract made on the 12th of November, and the conveyance of that date, are the only facts found on this part of the case, and we cannot presume any other. Let us then direct our attention to the language of the statute, and to the facts found by this special verdict. The statute was made, as appears by the preamble to the fifth section, which is incorrectly printed at the end of the fourth, for the avoiding of simony and corruption in presentations to benefices, &c. By the fifth section, it is enacted, that if any person shall, for any sum of money, &c., directly or indirectly, or for or by reason of any promise of any money, &c., directly or indirectly present any person to any benefice with cure of souls, or give or bestow the same for or in respect of any such corrupt cause, or consideration, then every such presentation shall be utterly void, and the queen and her heirs, &c., may present for that one time or turn. Now it is clear that he who enables another to do any act, which *without such enabling the other could not do, may be justly said, in [657] many cases, to do that act indirectly at least, if not directly. What then are the facts? It is found that on the 15th of November, 1819, Bradshaw the incumbent was afflicted with a mortal disease, so that he was then in ex-

trema danger of his life, and his life was thereby then greatly despaired of; that he continued to be so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be so greatly despaired of until the time of his death, and that he died on the same 12th of November, about half after eleven at night. That on the same 12th of November, about ten minutes after three in the afternoon, an agreement was made and concluded between Trafford, who was then seised of the advowson for his life, and the plaintiff, for the sale by Trafford to the plaintiff of the next turn or presentation, in consideration of 6,000*l*. That on the same 12th of November, and immediately after making the agreement, Trafford and the plaintiff, in pursuance of the agreement, and as an expedient to carry it into effect, and to convey the next presentation alone, executed the deed, of which the defendant has had oyer (being that on which the plaintiff's title is grounded) and which purports to be a conveyance of the advowson by Trafford to the plaintiff and his executors for ninety-nine years, if Trafford shall so long live. It is further found, that at the time of making the agreement and executing the conveyance, Bradshaw the incumbent was afflicted with the said mortal disease and in extreme danger of his life, and his life was thereby then greatly despaired of; and that Trafford and the plaintiff, at the time of making the agreement and executing the indenture, *658] well knew and believed that Bradshaw was afflicted with the *said mortal disease, and was in great danger of his life, and that his life was thereby then greatly despaired of. This finding is precisely according to the allegations in the seventh and some other pleas, and it differs from the allegations in the sixth plea, by substituting the knowledge and belief found by the jury for a knowledge of the mortal disease, extreme danger, and the despair of life, and *a belief that death was fast approaching*; in which, however, there is certainly no substantial difference. Can it then be said that an agreement for the sale of a next presentation, at a moment when the incumbent is, and is also known to be, afflicted with a mortal disease and in extreme danger of life, that is, at the point of death, followed by a deed, purporting to be a conveyance, not of the next presentation, according to the agreement, but of a term, which may happen to include two or more presentations, but intended only to convey the next presentation, is not a manifest evasion of the provisions of the statute, and an indirect presentation of the clerk of Fox, the buyer, by Trafford, the seller. If it be an evasion of the statute, it must be void according to general principles, and to the opinion on this statute intimated by Lord HARDWICKE in the case of *Grey v. Hesketh*, Ambler, 268, and to the well known doctrine under the bankrupt laws, that a voluntary payment made by a man on the eve of bankruptcy to a favoured creditor for the purpose of giving to such creditor a particular benefit, and thereby eluding the ratable distribution for which those laws provide, is utterly void, and the money may be recovered by the assignees under the commission. In our opinion, however, the presentation made under *659] *these circumstances is an indirect presentation by Trafford, the seller. It is, however, further found, that the agreement was made, and the conveyance executed without the knowledge or privity of Uppleby, the clerk afterwards presented by the plaintiff, and without any intention to present Uppleby to the church when it should become vacant. But the privity of the clerk is not a necessary ingredient in a corrupt or simoniacal contract, as appears by several of the cases quoted at the bar, and particularly by *Baker v. Rogers*. In that case a purchase of the next presentation for money one day after the vacancy of the benefice, was allowed to be void, because it was a fruit fallen and a chose in action not assignable; and the presentation was also held to be simoniacal, although the clerk presented by the purchaser was not informed of the facts until after his induction. Neither is an intention to present a particular individual a necessary ingredient; it may be, that the plaintiff intended to present some other individual, who, coming to a knowledge of the

nature of the contract, might refuse the presentation; or, that he intended to look out among a class of persons of particular habits, doctrines, or tenets, or that he chose to gratify his liberality by making a valuable gift to some person to be selected only for his general piety and learning. But these intentions do not affect the substance of the transaction itself; the transaction may be unlawful, though the use intended to be made of it was innocent, or even laudable. The contract makes the simony, Moore, 914. If, therefore, the substance of the transaction be, as we think it is, a bargain with Trafford for money, that he shall, by means of a conveyance to the plaintiff, and thereby in the plaintiff's name, present a clerk to a benefice which the parties consider as full in name and *form only, but vacant in reality, the transaction is unlawful, and the presentation is void. It has been contended, that if this presenta- [*660] tion be held void, there will be an opening to many questions and much litigation; that the only true criterion of a simoniacal contract, is the actual vacancy of the living; that if a conveyance made a few hours before the death of a sick incumbent be void, what shall be said of a conveyance made a few days, or weeks, or months, the incumbent being ill and not expected to live long. To all this I would answer, that the statute itself does not notice the vacancy of the benefice, so that vacancy is not made by any words of the statute essential to a corrupt contract; and it is consistent with *the words of the statute*, that a contract may be corrupt though the church be full. No person, I think, would doubt that a sale of the next presentation for money, accompanied by an agreement for an immediate or speedy resignation, would be within the statute. And if vacancy be not essential to a corrupt contract, we must look to the particular facts and circumstances of a case to ascertain the true nature and character of a contract. I need not here repeat the facts of this case. I hope they are such as have not often happened, and are not likely soon to happen again, and our judgment will be an authority only for a case of similar circumstances, and not for any case of a mere expectation of early vacancy from the apparent ill health, age, or infirmity of an incumbent, of which expectation the fulfilment may be long delayed or wholly frustrated; for we consider the present to be, as I have before said, the case of a church full in name and form only, but vacant in substance and reality, and known so to be by the contracting parties, who dared not to exhibit their contract in its true shape, but endeavoured to *cloak and mask it by the semblance of a conveyance, more extensive in its [*661] form, but limited in operation, by their mutual agreement to the sole object of their contract, which was an immediate and single presentation to a benefice about which the parties treated as if it was then actually vacant. For these reasons the judgment of the Court below is to be affirmed.

Judgment affirmed.

JOHN CARD and DAVID CANNAN v. WILLIAM HOPE.

A. and B. (being owners of nine sixteenth shares of a ship, and also husbands or managing owners,) by deed, sold five sixteenths to C. The deed contained a covenant that C. should be appointed to the command of the ship, and that A. and B. should continue to have the management, as husbands, and should elect the tradesmen and appoint all the officers; and that if C. should relinquish the command, or die, A. and B. should appoint such fit person to succeed him as might be approved of by him or his executors, or that he or they might nominate a fit person to the command in his stead, and that A. and B. should be employed as the agent of C. in the concerns of the ship; and if C. should be minded to sell all or any of his shares, he might do so, upon condition that the purchasers should abide by the stipulations in the deed, and not remove A. and B., or the survivor of them, from being managing owners, so long as they should perform the stipulations on their part: *Held*, that although the covenant to continue A. and B. as C.'s agents in the concerns of the ship might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares, with a stipulation for the appointment to the command, and the continuance of the management, it was illegal and void.

Covenant upon an indenture bearing date the 9th of December, 1818, which recited that Card and Cannan were together legally entitled, and stood pos-

sessed of, and interested in, nine sixteenth shares or parts of the ship Herefordshire, at that time commanded by Captain John Money, and under a charter-party for freight to the East India Company for six successive voyages to and from the East Indies, two of which voyages had been performed; and that the defendant, Hope, had contracted with Card and Cannan for the purchase of five sixteenth shares or parts of the ship at the price of 22,000*l.*, and upon the terms thereafter specified; and that Hope should be appointed to the command of the *ship so soon as she should have completed her next or *662] then voyage under the charter-party, if not earlier appointed to the said command, and that Card, or Card and Cannan, and the survivor of them, should continue to be the managing owner or owners of the ship, and should effect all the insurances on the five sixteenth shares of the ship so agreed to be purchased by Hope, and conduct the other concerns of Hope as the owner of the said five sixteenth shares thereof, in manner thereafter particularly described. This deed contained the following covenants: Card and Cannan covenanted to sell and transfer to Hope, and he covenanted to purchase five sixteenth shares or parts of the ship, free and clear of all debt, claim, demand, or liability of any kind whatever, up to the time of the ship's entering into the dock for survey and repair previously to entering upon her next or third voyage, at the sum of 22,000*l.* sterling, to be paid in manner therein mentioned; that is to say, the sum of 10,000*l.*, part thereof, to be paid to Card on a good and valid bill of assignment, or transfer of the five sixteenth shares or parts of the ship, being duly executed and made by Card and Cannan, or one of them, to and into the name of Hope, and the remaining sum of 12,000*l.* to be secured by the joint and several bond of Hope, and such other person as might be approved of by Card and Cannan, and to be made payable with interest at five per cent. per annum, in the proportions and at the periods following; that is to say, the sum of 5000*l.*, part of the said sum of 12,000*l.*, to be payable on the 19th December, 1820, and the residue of the said sum to become due and payable on the 9th December, 1821. Covenant, that Card and Cannan, and the survivor of them, should be, and continue to be, the managing owners or husbands, owner, *663] or husband of *the ship, so long as they or he should be desirous to continue, and should faithfully and to the best of their or his ability attend to and conduct the concerns of the ship. And that so soon as the ship should have completed her next or third voyage, Hope should, if that event should not have before taken place, be appointed to the command of the ship on all her future and succeeding voyages, both for and during the continuance of the then charter-party, and such other voyages as, after the expiration or other determination thereof, she might undertake or perform; and that Card and Cannan, or the survivor of them, as such managing owner or owners, should do all necessary acts to have Hope effectually invested with the command of the ship according to the rules of the service of the East India Company; and that Hope should have and enjoy all the usual advantages appertaining to and to be derived from such appointment and command; and further, that in case Hope should from ill health, or from any other cause, retire from and resign the command, or that he should depart this life before he should be appointed to or assume the command, or while holding the same, or as the case might be, that Card should be at liberty to appoint a fit and proper person as a successor to Hope, upon such terms as might be approved of by Hope or his executors, &c.; or upon such terms as Hope, his executors, &c., might be able to obtain on the nomination and appointment of such successor; and in case Card should decline to appoint such successor on the terms aforesaid, then that Hope or his executors, &c., should be permitted to appoint in his stead a fit and proper person to the command of the ship; and that such person so appointed, should be *664] entitled to *all the advantages that he, Hope, would by the said indenture be entitled to in right of such command; and that the managing

owner for the time being should perform and fulfil all the several stipulations and agreements for the benefit and advantage of such person that might be appointed as last aforesaid that Hope would be entitled to demand and require if holding and in actual command of the ship; and further, that Card and Cannan, or the survivor of them, as such managing owners or owner, or ship's husband, should be allowed for all expenses properly incurred in the management and conduct of the concerns of the ship, and a commission of 2l. 10s. per cent. upon all moneys and freight received for the account of the owners of the ship, and in consideration thereof, that they, as such ship's husbands as aforesaid, should keep proper books and accounts of all the transactions entered into and carried on for and on account of the owners in respect to the management and concerns of the ship, as he or they should from time to time require; and that Card and Cannan, or the survivor of them, as such managing owners or owner as aforesaid, should from time to time give credit to Hope and the other owners of the ship for all moneys, profits, and emoluments received for and on account of the ship and the owners thereof, and should and would give credit, and allow to the owners all discounts and allowances employed for and on account of the ship; and further, that Card and Cannan, as merchants and copartners, or the survivor of them, should from time to time be employed as the agents of Hope in the concerns of the ship, and effect the insurances on his five sixteenth shares or parts thereof, also on all such investments on the several outward *and homeward voyages, as he might from time to time [*665 make and have on board the same ship, whether the same consisted of goods or specie: and that Card and Cannan, or the survivor of them, as such managing owners or owner as aforesaid, should have the right of nominating and appointing all the other officers to serve on board the ship, and that Hope should and would, on such nomination and appointment, present from time to time, and at all times thereafter, all and every such officers to the honourable court of directors of the East India Company, in order to their being confirmed in their respective stations: that Card and Cannan, or the survivor of them, should and might select and appoint the several tradesmen and artificers for the outfit and repairs of the ship on her several voyages, so long as the said last-mentioned right of appointment was exercised and used by Card and Cannan, and the survivor of them, to the best advantage and interest of Hope, and the other owners of the ship: that in case Hope, or his heirs, executors, or administrators, should be minded or desirous to sell and dispose of the whole or any of the said five sixteenth shares, that he or they should be at liberty so to do, upon the condition and express proviso, that any person or persons so purchasing the whole or any of the said shares should abide by and perform all the several terms, conditions, stipulations, contracts, and agreements thereinbefore expressed, declared, and agreed, and should do no act or deed to remove or displace Card and Cannan, or the survivor of them, from being the managing owners or owner of the said ship, or the agents or agent of the then or any future captain, so long as they continued to observe and keep all the *se- [*666 veral covenants, stipulations, and agreements to be performed on their part; and that such purchaser or purchasers should sign a memorandum, to be subscribed to the said indenture, agreeing to be bound and concluded thereby, to all intents and purposes, as Hope, his executors, administrators, or assigns, would be bound and concluded, had he or they still held and retained the said shares. There then followed a covenant to submit disputes to arbitration. The declaration, after averring performance of covenants by plaintiffs, assigned three breaches, first, that defendant did not allow the plaintiffs to continue managing owners, or the husbands of the ship, but on the contrary thereof removed and displaced them. Second, that defendant did not employ plaintiffs as his agents in the concerns of the ship. Third, that defendant refused to submit differences to arbitration. Defendant pleaded several pleas. The question

argued in the first instance was raised by a demurrer to two special pleas of the bankruptcy of the plaintiff, Card; which alleged, that by reason thereof the plaintiffs became and were incapable and unable to attend to and conduct the concerns of the said ship, as such managing owners and ship's husbands, according to the form and effect of the indenture. There was a second plea of bankruptcy, alleging, that thereby and by reason thereof, the defendant became and was discharged from the covenants. There were similar pleas to the second breach. To these pleas the plaintiff demurred, and in Michaelmas term the case was argued upon the sufficiency of these pleas, the question being, whether the bankruptcy of Card was an answer to the action. On the part of *667] the plaintiff the following *authorities were cited, *Chippendale v. Tomlinson*, 1 Cooke's B. Laws, 406; *Silk v. Osborn*, 1 Esp. N. P. C. 140; *Evans v. Brown*, 1 Esp. 170; *Fowler v. Down*, 1 Bos. & Pul. 44; *Webb v. Fox*, 7 T. R. 391; *Flood v. Finlay*, 2 Ball & Beatty, 13; *Clark v. Calvert*, 8 Taunt. 742; *Wetherall v. Geering*, 12 Ves. 504, and *Brooke v. Hewitt*, 3 Ves. 253.

In the course of the argument it was suggested by the Court, that the deed itself might be void, on the ground that one of the main objects of it was a bargain for the appointment of a particular individual to the command of a ship which was then chartered for several successive voyages, and they directed a second argument upon this point. The case was again argued in this term by

Kaye, for the defendant. This deed is void, inasmuch as it appears to have been founded on a sale of the command of the ship, and the appointment and the continuing of the defendant in that command was part of the consideration for the defendant's covenant to continue the plaintiffs as managing owners. Although the covenant to continue the plaintiffs ship's husband might be legal by itself, yet if the whole deed depends upon a fraudulent contract it is void. Now it is clear, from the recitals in this deed, that part of the original bargain was, that the defendant should have the command of the ship; and it is probable, therefore, that he either paid something more for the shares in consideration of his having that command, or that his appointment was the consideration for his covenanting to continue the plaintiffs as managing owners. In either case *668] the plaintiffs *derived a profit from the sale of the command. Now if this, instead of a deed, had been a parol contract, and Hope had brought an action against the plaintiffs for not appointing to the command, the declaration must have alleged, that in consideration that the defendant had purchased the shares in the ship, and had agreed to continue the plaintiffs as managing owners, they had promised to appoint him to the command. But *Blachford v. Preston*, 8 T. R. 89, is an authority to show that such a contract is void. Besides, the deed is fraudulent as against the other part owners, for they have a right to expect the exercise of an impartial judgment in the selection of officers. The majority of the shareholders in value have the power of appointing officers, and any contract calculated to have the effect of fettering their judgment, is a contract in fraud of the other part owners. It is also fraudulent as against the charterers: they also have an interest in the appointment of fit persons to be officers, and they had a right to the exercise of an unbiased judgment on that subject by the person having the power of appointing the officers. For the same reasons, also, this deed is contrary to public policy.

Evans, contra. The contract in this case was no fraud upon third persons, for this species of contract is in constant use among the owners of ships in the East India service, and they must, therefore, be taken to have been consensual to it. Neither was it a fraud upon the charterers. It is an established principle, that a party is not to be presumed to have done that which is against law; and there is nothing on the face of the deed to show that there was any sale of the *669] *command. It does not appear that the price paid for the shares exceeded their real value. At all events, the covenant to appoint the de-

defendant to the command is an independent covenant, and per se is not illegal. As to the agreement to continue the defendant in the command, that is mere surplusage, for the owners have not the power of removing a captain without the consent of the East India Company. In *Blackford v. Preston*, 8 T. R. 89, it was held that a sale of the command of a ship in the East India Company's service was illegal; but there, evidence was given to show that it was contrary to the by-laws of the company. Here, the by-laws are not set out upon the pleadings, and the Court cannot take judicial notice of them. As to the plaintiffs having the appointment of other officers, there is no danger of an improper person being appointed; because, before their appointment, they must undergo an examination, and be approved of by the company. As to the profit to accrue to the plaintiffs as managing owners, *The Attorney-General v. Borrodale*, 1 Price, 148, is an authority to show that managing owners have a right to commission. The agreement, in fact, gave the plaintiffs no power which they did not possess before; for the majority of the shareholders in value always have the control over the appointments. The plaintiffs, as owners of nine-sixteenths might therefore have appointed to the command, and if it were a fraud upon the other owners to agree that the defendant should be appointed to the command, it must have been equally fraudulent for one person to hold nine-sixteenth shares; for by holding that number of shares, they acquired the power of appointing themselves managing owners, and of *appointing the cap- [*670 tain; and having got that power, they might surely sell part of their shares, retaining in themselves the right to continuing managing owners. Besides, the deed contains covenants for keeping proper accounts. In the case of a ship chartered in the common way, the owner certainly might appoint all the officers, although, where there is no stipulation to the contrary, that appointment may belong to the captain, *Rosiere v. Sawkins*, 12 Mod. 434. Nothing appears on the pleadings about the East India Company. This case, therefore, stands upon the same footing as any other. [BAYLEY, J. The case which you state was that of a sole owner.] It applies equally to the owner of a majority of the shares, for he must have the control if he pleases to exercise it. The exercise of such a power in the East India Company's service is in fact less dangerous than in any other; for the choice of the voyage does not rest with the owners, and every officer undergoes a strict examination before he can be appointed. At all events, this is a question which cannot be properly disposed of by any tribunal but a jury; for fraud is not to be presumed, but ought to be expressly found.

Cur. adv. vult.

The judgment of the Court was delivered in the course of the term by ABBOTT, C. J. This was an action of covenant brought against the defendant for refusing to allow the plaintiffs to continue managing owners or husbands of the ship *Herefordshire*, employed in the service of the East India Company, for refusing to continue them as agents to *the defendant in the concerns [*671 of the ship, and to refer disputes to arbitration. To each of the first two alleged breaches of covenant, the defendant pleaded specially the bankruptcy of the plaintiff Card, before his refusal, concluding that by reason thereof he was discharged from his covenant. To these pleas the plaintiffs demurred; and the case was in part argued on the sufficiency of the pleas in last Michaelmas term. In the progress of the argument on that question, the Court suggested a doubt as to the legality of the deed itself, and directed the case to be argued upon that question, which was done in the present term; and we are of opinion that the deed is illegal and void, and that judgment should be entered for the defendant, on the insufficiency of the declaration.

It will be necessary to advert to several parts of the deed at some length, in order to make the ground of our judgment intelligible. After reading the parts of the deed before set out, the lord chief justice proceeded as follows:

Upon the perusal of the deed, it appears to be a sale of five-sixteenths of the

ship to the defendant by the plaintiffs, then being owners of nine-sixteenths, and husbands or managing owners of the ship, founded upon and accompanied by an agreement between those parties, that the defendant shall be appointed to the command of the ship; that the plaintiffs shall continue to have the management as husbands, so long as they execute their duties faithfully and to the best of their ability, shall elect the tradesmen, and appoint all the officers; and further, that if the defendant shall relinquish the command, or die, the plaintiffs shall appoint such fit person to succeed him as may be approved of by him or his *executors, upon such terms as he or they may be able to obtain, or *672] that he or they may nominate a fit person to the command in his stead; that the plaintiffs shall be employed as the agents of the defendant in the concerns of the ship: And further, that if the defendant shall be minded to sell all or any of his five-sixteenths, he may do so, upon condition that the purchasers shall abide by the stipulations of the deed, and not remove the plaintiffs, or the survivor of them, from being managing owners, so long as they shall perform the stipulations on their part; and the purchaser shall sign a memorandum to be subscribed to the deed, agreeing to be bound thereby, as if the defendant himself had retained his shares. So that this, in effect, is a contract between the owners of the major interest in the ship, on a sale of a part of their interest, that the purchaser shall have the command of the ship at sea, and the sellers the management of her in port, and the appointment of all the other officers of the ship, and the choice of the persons who are to furnish and repair her, and this without the privity or concurrence of the other owners, as we must infer, because no such privity appears on the deed, and because, unless some of the other owners had concurred with the defendant in displacing the plaintiffs from the management, they would have retained it, his interest alone being insufficient for that purpose. And this contract was made at a time when the ship was engaged or chartered for several voyages, three whereof still remained to be performed. The covenant on the part of the defendant to continue the plaintiffs as his own agents in the concerns of the ship might be lawful if it stood alone, but being founded, as it is, on the contract for sale of the shares, and for *673] the appointment to *the command and the continuance of the management, if this its foundation be illegal, it becomes invalid, and cannot be enforced at law. And we are of opinion that this contract is illegal and void.

The command of a ship in the service of the East India Company is well known to be a matter of very considerable value; so likewise is the management of such a ship as her husband. And it is impossible to read this deed without seeing that it is a bargain for a profit to be derived to the plaintiffs from the appointment of the defendant or his nominee to the command; the profit being either a greater price for the shares sold, or the continuance of the management and other powers and authorities in themselves, or partaking probably of both. And we are of opinion that such a contract is void, as being contrary to the interest of the charterers and of the other owners. It may be true, as was alledged by the learned counsel for the plaintiffs, that no person can be appointed to the office of commander, mate, or other officer in the service of the East India Company without the approbation of the company; but this will not alter the case, for the company are entitled not only to the security of such inquiry and examination as they may be able to make into the fitness of the persons recommended by the owners, but also to the benefit of a free, impartial, and disinterested recommendation, on the part of the owners, of the persons who are to be intrusted with so important a service as the command and navigation, on a long and distant voyage, of a ship to be freighted with a very valuable cargo, and having on board a numerous crew and many passengers.

*674] It was further argued on the part of the plaintiffs, that we cannot in this case take judicial notice of any of the by-laws or regulations of the company on this subject, because they are not stated on the record to which

our view must be confined; and to this we accede; but whether we consider the East India Company to be, according to the expressions of Lord KENYON, in *Blackford v. Preston*, a limb of the government of the country, or such a body that, according to the opinion of Mr. Justice LAWRENCE, no distinction can be established between offices held under that company and those under government, as far as respects this purpose; or whether we consider the company merely as private merchants, charterers of a ship, our opinion upon this case will be the same.

We think a contract like the present, regarding a ship engaged in any trade or service, must be void in law, as being contrary to the interest of the charterers and of the other owners. It is a part of our national policy to give every encouragement to the equipment and employment of ships. Upon this consideration, the law enables a majority of the part-owners (under guards, indeed, to the interest of the minority peculiar to itself) to employ their ship even against the will of the minority, that the ship may not remain unemployed. A power of employment vested in the majority seems to import a power of appointing officers, and in practice the majority certainly exercise that power. But such a power carries with it a duty, the duty of exercising a free and impartial judgment in the choice of every person who is to be intrusted with the management of the outfit, and with the navigation of the ship, ut dentur digniori. And any contract which is calculated to have *the effect of fettering the judgment, [*675 and of binding the party to concur in the nomination of particular persons, at the peril of an action, is a violation of that duty. The violation of duty becomes greater and more odious if the contract be founded on motives of peculiar gain and advantage to the contractor; all the part owners ought to share ratably in every profit that may be made of the ship. And if such contracts could be allowed by law, they must operate as a discouragement to persons to become part owners of ships. The duty, however, is owing not only to the charterers and other part-owners of a ship, but also to all whose life or property may be embarked in her. And, consequently, a violation of the duty is contrary not only to the interest of the charterers and part-owners, but also to another most important object, namely, the protection and safety of the lives and property embarked on the sea. I have already observed, that although the charterers in this case may have the control over the appointment of the officers of the ship, yet that they are nevertheless entitled to the security of a free and impartial choice of the officers to be recommended to them. And with regard to the other owners, although it may be true that, by becoming owners at a time when a majority of the interest was vested in the plaintiffs, they knew that this majority of interest might, as it respects themselves, carry with it every power for the exercise and continuance of which this deed provides; yet they might well rely, for the faithful exercise of every authority, on the interest which the plaintiffs had in the prosperity of the ship, as being paramount to all other considerations. But this deed is calculated to deprive them of that security, because it continues a very large *part of the same powers in the plaintiffs, [*676 after their interest in the ship is diminished, and may, by a still further severance, not only of the interest retained by them, but of that which they have conveyed to the defendant, accompanied with stipulations and obligations like those which are contained in this deed, ultimately place the entire management of the ship, by land and at sea, in the hands of persons who have very little interest in her. So that a deed like the present is calculated to deprive both the charterers and the other part-owners of that security to which they are entitled, and on which they must be presumed to have relied when they assumed those respective characters. For these reasons we are of opinion that judgment must be for the defendant.

Judgment for defendant.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Easter Term,

IN THE FIFTH YEAR OF THE REIGN OF GEORGE IV.

*677]

*MEMORANDA.

In the course of this vacation, The Right Honourable Lord *Gifford* was appointed to the office of Master of the Rolls, which had become vacant by the death of Sir *Thomas Plumer*.

Sir *William Draper Best*, Knight, one of the Judges of the Court of King's Bench, was appointed Lord Chief Justice of the Court of Common Pleas.

And *Joseph Littledale*, Esq., of Gray's Inn, was called to the degree of Serjeant at Law in the vacation, and appointed to the office of a Judge of this court. He took his seat in this court on the first day of this term. The motto on his rings was "*Justitiæ tenax*."

*678] In the course of this term, *William St. Julien Arabin* and *Thomas Wilde*, of the Inner Temple, were called to the degree of Serjeants at Law. The motto on their rings was "*Regi regnoque fidelis*."

WEAVER v. LLOYD.

Where a libel charged the plaintiff with various acts of cruelty to a horse, and amongst others, with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect; the jury having found that it was true in all particulars, except that the eye was not knocked out: *Held*, that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea.

CASE for a libel published in an Oxford newspaper. The paragraph set out in the declaration charged the plaintiff with brutal usage of a horse, in riding from Oxford to Abingdon, and after various particulars concluded as follows: "We learn that, on reaching Abingdon, the horse presented a most shocking spectacle, having one eye literally knocked out, besides being dreadfully lacerated and injured in various parts of its body. Being conscious that its condition would excite attention, he ordered the person who had the care of the horse not to let any one go into the stables." The defendant pleaded, first, not guilty; secondly, a justification averring the truth of each particular of the statement; thirdly, that the matters contained in the supposed libel were true in substance and effect.

Replication, de injuria. At the trial before GARROW, B., at the last Oxford assizes, the jury found a verdict for the plaintiff on the first plea, and as to the others, that two of the matters alleged were not true; viz., that the horse's eye, although much injured, was not literally knocked out, and that plaintiff had not ordered that no person should be allowed to go into the stables to see the horse; but that the alleged libel was true in substance and effect. The learned judge then directed *them to find a verdict for the plaintiff, and gave the defendant leave to move to enter a verdict in his favour, if the court should [*679 think the third plea supported by the evidence. The jury accordingly found a verdict for the plaintiff with 1s. damages.

W. E. Taunton now moved to enter a verdict for the defendant, and contended, that the jury were warranted in finding that the alleged libel was true in substance and effect. The horse's eye was shown to be much injured, although the sight was not entirely destroyed, and the supposed order, not to admit any person into the stable was not any part of the libellous matter, it was therefore unnecessary to prove the truth of it. *Edwards v. Bell*, 1 Bing. 403.

Per Curiam. The defendant did not succeed in proving either of his special pleas. The second plea, which distinctly averred the truth of the two facts which were not proved, clearly was not supported, and the third plea alleging that the charge was true in substance and effect, must mean that each particular of the charge was true in substance. In the case cited, the passage not proved formed no ingredient of the charge against the plaintiff. Here, the statement that he knocked out the horse's eye imputed a much greater degree of cruelty than a charge of beating him on the other parts of the body. If we were to hold this a sufficient justification, exaggerated accounts of any transaction might always be given with impunity.

Rule refused.

*DOE on the Demise of MARY GIBSON, JOHN GELL, JOHN WELBURN and HANNAH his Wife, and JOHN IDLE and [*680 SUSANNAH his Wife, v. SARAH GELL.

Devise "to my daughter M. G. all the houses, out-houses, garden, and other property, which I now hold under the trustees of the poor of the township of A. for the term of 999 years. I also give one half-part of my books to my daughter M. G. aforesaid; the other half-part to my widow S. G., to be equally divided by T. S. If my daughter M. G. should happen to die unmarried, it is my will then that her part aforesaid shall be equally divided amongst all my brothers and sisters, share and share alike by lot;" Held, that the latter clause applied to all that had before been given to M. G., and not merely to her half-part of the testator's books.

EJECTMENT to recover four houses and a garden. At the last Yorkshire assizes it appeared that the defendant was the widow of Thomas Gell, and that J. Gell was his brother, and Mary Gibson, Hannah Welburn, and Susannah Idle, his sisters. Thomas Gell by his will, dated January 1st, 1821, devised as follows: "I give and bequeath to my daughter Mary Gell, all the houses, out-houses, garden and other property which I now hold under the trustees of the poor of the township of Almondbury for the term of 999 years. And I also give one half-part of my books to my daughter Mary Gell aforesaid. The other half to my widow Sarah Gell, to be equally divided by T. S. If my daughter Mary should happen to die unmarried, it is my will then that her part aforesaid shall be equally divided amongst all my brothers and sisters, share and share alike by lot. All the rest and remainder of my property I give and bequeath to Sarah Gell, my widow." He then made his widow and T. S. executrix and executor. Thomas Gell died in 1821, and his daughter Mary died soon afterwards unmarried and under age. The widow then took possession of the premises in question, being those mentioned in his will. Evidence was

*681] given to show that they consisted of four houses *with one garden, which, however, was capable of being divided into four. It was contended for her, that the clause respecting the division of the daughter's part, in the event of her dying unmarried, applied to her part of the books only, and did not operate to give the lessors of the plaintiff any interest in the real property. The learned judge thought that it applied to all that was left to her, and directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

F. Pollock now moved accordingly. By the will in question, the testator first bequeathed to his daughter all his property of a particular description, and then a half-part of certain property of a different description. He then directs, that if his daughter die unmarried, her *part aforesaid*, which can only refer to that property of which she had a half-part, shall be divided by lot. The mode of division, too, explains the testator's meaning, for that is altogether inapplicable to one entire leasehold estate. [BAYLEY, J. There was evidence that it consisted of four houses and a garden, capable of being divided into four.] If the words of the will can have a reasonable construction without that evidence, it cannot properly be taken into consideration.

ABBOTT, C. J. I think that the expression, "her part aforesaid," applies to the whole, which, by the former part of the will, had been given to the daughter. And this construction is corroborated by the nature of the property. It is given over upon the death of the daughter unmarried. Now that is a provision much *more likely to be made respecting real property, than the *682] half-part of the books which were bequeathed to Mary Gell.

Rule refused.

SIMPSON v. ROUTH and Others.

The plaintiff's goods were distrained for poor-rates, and upon the sale produced 4*l.* 7*s.* more than was necessary to satisfy the levy. The defendants tendered to him 3*l.* 14*s.*, which he refused to accept, saying that it was too late, but did not then or at any other time demand a settlement of the account and the payment of the overplus: *Held*, that the 27 G. 2, c. 20, prevented the plaintiff from recovering without making a demand before the commencement of the action, and that the tender did not make such demand unnecessary.

ASSUMPSIT for money had and received. Plea, non-assumpsit, as to all but 3*l.* 14*s.*, and tender of that sum. Issue thereon. At the trial before HOLROYD, J., at the last Yorkshire assizes, it appeared, that the defendants had seized and sold certain goods of the plaintiff, under a warrant to distrain for poor-rates. The articles sold produced 4*l.* 7*s.* more than was necessary to satisfy the levy. The overplus was never demanded, but the defendants tendered to the plaintiff the sum of 3*l.* 14*s.*, which he refused to accept, saying that it was too late. That sum was afterwards paid into court. The learned judge thinking that the action could not be maintained without a previous demand of the overplus, directed a nonsuit, but gave the plaintiff leave to move to enter a verdict for 13*s.*

D. F. Jones now moved accordingly, and contended, that the 27 G. 2, c. 20, which enacted, that the overplus should be returned to the party distrained upon, did not render it absolutely necessary to make a demand before the commencement of the action. Even without the aid of the statute, this plaintiff might have maintained an action for the surplus produce of the articles distrained, without any previous demand. Now as that statute was made to secure him the return of the *overplus, it cannot be so construed as to *683] abridge his remedy. Secondly, even if a demand was necessary to entitle the plaintiff to the money, the bringing of the action was of itself a sufficient demand. Thirdly, the plea of tender admits there was some attempt at a settlement of accounts between the parties, which supersedes the necessity of a demand, or at all events raises the presumption, that a demand of a settle-

ment was made, and the plaintiff could not possibly know the precise sum that he was entitled to receive.

ABBOTT, C. J. However the law might have stood before the passing of the act in question, I am clearly of opinion, that the right of a plaintiff to recover in such an action as the present, is limited to those cases where he has previously made a demand of the surplus. The second section of the act states, "that the officer making the distress shall deduct the reasonable charges of taking, keeping, and selling such distress, out of the money arising by the sale; and the overplus (if any) after such charges and also the said penalty or sum of money shall be fully satisfied and paid, shall be returned, *on demand*, to the owner of the goods and chattels so distrained." If we were to hold, that an action would lie for the surplus without any demand, we should convert the statute into a snare, by which every parish officer would be rendered liable to a variety of actions. If it were necessary to pay the money without demand, it would be incumbent on the officer to follow and make a tender to the party distrained upon, in whatever part of the kingdom he might happen to be. In this as in other cases, where a demand is necessary to give a right of action, the commencement of the action is not of itself a sufficient demand. Neither does the tender supply the place of a demand. A tender and [*684 payment of money into court, admit the precise sum tendered or paid in to be due, but the admission does not extend beyond that. For these reasons, I think that the nonsuit was right.

BAYLEY, J. I am clearly of opinion, that it was necessary to make a demand before the commencement of the action, and that such a step would have been necessary at common law, without the aid of the statute. There was no contract between the parties. The defendants had a public duty to perform for the parish, and probably could not avoid raising more than the sum mentioned in the warrant, for they could not divide any chattel, and sell a part of it, so as to make up the exact sum. The object of the statute in providing that the overplus should be demanded, was probably to bring the parties together, to make a settlement; and if in this case it had appeared that the plaintiff had demanded a settlement generally, and the tender had been made upon that, or if the tender had been made in pursuance of any meeting for the purpose of settling the accounts, I am not prepared to say that it would not have superseded the necessity of any other demand; but it does not appear, that when the tender was made, or at any other time, the plaintiff demanded a settlement. I am, therefore, of opinion, that we ought not to grant any rule in this case.

LITLEDALE, J. It appears to me, that the plaintiff in this case could not maintain an action without previously making a demand. It has been said, that the very commencing an action was a demand. That may be [*685 sufficient where the money is payable according to any contract between the parties, for there it may be supposed, that at the time of making it, the plaintiff demanded that the money should be paid at a certain time. In such cases, bringing an action cannot properly be called making a demand, but enforcing a prior request to pay the money when due. But in other instances, such as a bond with a penalty to pay a certain sum on demand, there an express demand must be made before the action can be maintained. So in an action on a promise to pay a collateral sum on request, *Birks v. Trippett*, 1 Saund. 32. The next question is, whether the tender admitted a demand. I think, that it admitted nothing more, than that the sum tendered was due. If at that time the plaintiff had said it was insufficient, and had demanded a further account, I am inclined to think that it would have been sufficient.

HOLROYD, J. The right of action in this case is founded upon the statute, and that authorizes the party levying to retain the surplus until it is demanded. Nor does that impose any hardship, for at common law, if trover had been brought for the goods, a previous demand must have been made. Neither does

the tender appear to supply the place of a demand; there must be an express demand, or that which is equivalent to it. The plaintiff said he would not take the sum tendered, because it was too late, not because he claimed a larger sum. A tender admits all the facts in a special count, but if pleaded to a general count, has no effect, but that of admitting that the sum tendered is due.

Rule refused.

*686]

*ELIZABETH CROSS v. LEWIS.

In case for obstructing the plaintiff's ancient windows, it appeared that the plaintiff and defendant had premises adjoining each other; the plaintiff's house was about four feet within the boundary of her premises. Some witnesses had known it for thirty-eight years, and during all that time there had been windows looking towards the adjoining premises. For a long series of years before the defendant purchased them, those premises had belonged to a family living at a distance, and it was not proved that any member of that family had ever seen them, and they had been occupied by the same tenant for the last twenty years. About two years before the action brought, defendant purchased them and built a house, thereby darkening the plaintiff's rooms: *Held*, that the circumstance of plaintiff's house not being at the extremity of her premises, did not affect the question, and that after an enjoyment of thirty-eight years, in the absence of any contradictory evidence, the windows were to be considered as ancient windows, and that plaintiff consequently was entitled to recover.

CASE for erecting a wall near plaintiff's ancient windows, and obstructing the light and air. Plea, not guilty. At the trial before HOLROYD, J., at the last Lancaster assizes, it appeared that the plaintiff was possessed of a house in the town of Blackburn with a yard about four feet wide on one side of it bounded by a wall, and there were several windows looking in that direction. No evidence was given as to the time when the house was built, but some of the witnesses had known it for thirty-eight years, and the windows in question had existed during all that period. In 1821, the defendant bought the premises adjoining the plaintiff's yard, and built a house thereon, coming within five feet of the plaintiff's wall, and which darkened the windows opening in that direction. For a long time before the adjoining premises were purchased by the defendant, they had belonged to a family named Heber, and there was not any evidence to show that any member of that family had ever been at Blackburn, or had ever seen the premises, which had been for twenty years next before the sale, in possession of the same tenant (Mrs. Percy,) but whether they were held from year to year or for a term of years, was not proved. For the defendant it was objected, first, that from the situation of the premises, the plaintiff's *687] windows not being at the extremity of her land, *the presumption of a grant of a right to have windows in that direction did not arise; and, secondly, that the doctrine of presumption could not apply to this case, for want of evidence to show that the owner of the adjoining premises knew that the windows had been opened. The learned judge thought, that upon the evidence, the windows were to be considered as ancient windows, and directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

J. Williams now moved accordingly. A grant in this case could not be presumed, for it was unnecessary. The plaintiff needed no grant, the windows not being put out at the extremity of her land, and a grant cannot be presumed unless it be necessary in order to account for the existence of things in the state in which they are found, *Doe v. Reed*, 5 B. & A. 232. Here no unlawful act was done at first, and therefore there is no ground for presuming a grant. Secondly, there was not any evidence that the then owner of the defendant's land ever knew that the windows had been made; and in the absence of that knowledge the presumption of a grant cannot be raised against him, *Daniel v. North*, 11 East, 372. Nothing done by the lessee without the consent of the landlord, would give the right, *Wood v. Veal*, 5 B. & A. 454. It should therefore have been left to the jury to say, whether they believed that notice had or

had not been given to the landlord, *Darwin v. Upton*, 2 Saund. 175 b, n. 2.(a)

*ABBOTT, C. J. In the case of *Wood v. Veal*, it appeared, that a lease for ninety-nine years had been granted, and that as long as living memory went, all persons had been accustomed to go upon the locus in quo at their pleasure; and I left it to the jury to say, whether there had been a dedication to the public before the lease was granted. The expressions there used as to what would or would not bind the landlord, were intended to be applied to the case then before the court, not generally; and I do not see any reason to retract them. In the present case I think that the position of the plaintiff's house, upon which one point has been made, is of no importance. In actions for obstructing light no question was ever before made, as to whether the windows were or were not opened at the extremity of the plaintiff's land, nor was it ever imagined that his rights could be varied by that circumstance. As to the second point; if it had appeared in evidence that the windows were opened during Mrs. Percy's tenancy, there would have been much weight in the argument which has been urged for the defendant. Or if the evidence of Mrs. P.'s tenancy had gone as far back as that of the existence of the windows, it would have been material to inquire, whether at that time they had or had not the appearance of ancient lights. But upon this evidence it must be taken, that they were ancient lights, existing before Mrs. P.'s tenancy commenced, and every presumption must be made in favour of them. For these reasons, I think that the direction of the learned judge was right, and that we ought not to disturb the verdict found for the plaintiff.

*BAYLEY, J. I am of opinion that a proper direction was given to the jury in this case. I do not say that twenty years possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision of *Darwin v. Upton*, it has been held, that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it. In *Bealy v. Shaw*, 6 East, 208, Lord ELLENBOROUGH says, "I take it, that twenty years exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right, in the party so enjoying it, derived from grant or act of parliament." It has been argued, that in order to found such a presumption, it must be shown, that the first act was illegal. If so, the doctrine of presumption can never apply to windows, for a person building a house, even at the extremity of his own land, may lawfully open windows looking towards the adjoining property. If his neighbour objects to them he may put up an obstruction, but that is his only remedy; and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them. This case is much stronger, the right is proved to have existed for thirty-eight years; the commencement of it is not shown. It is possible that the premises, both of the plaintiff and defendant, once belonged to the same person, and that he conferred on the plaintiff, or those under whom she claims, a right to have the windows free from obstruction. *Daniel v. North* has been relied upon, to show that the tenancy of Mrs. Percy rebutted the presumption of a grant; but this is a very different case; her tenancy was shown to have existed for twenty years. but the origin of the plaintiff's right was not traced.

LITTLEDALE, J. It makes no difference in this case that the windows were not at the extremity of the plaintiff's land; for, unless something be shown to restrain his right, a man may, at the extremity of his land, put out windows looking in any direction whatever; and for that reason, the vendor of land for building, not unfrequently takes a covenant to restrain that right. The case of windows is, therefore, always different from the exercise of a right of way or of common; for there, if the thing be done without a right, an actual trespass

is committed. As to the second point, it was proved, that the windows had existed for thirty-eight years, and Mrs. Percy's tenancy for twenty. How the land was occupied for eighteen years before that time did not appear. I think that quite sufficient to found the presumption of a grant, and that this verdict ought not to be disturbed.

HOLROYD, J. At the trial I considered the windows in question as ancient lights, and that the plaintiff had by law a right to enjoy them, and that it was not a question to be determined by the jury, without some evidence to contradict the idea of their being ancient lights. In *Daniel and North* this view of the question could not be taken, for the putting out of the windows was proved. A stream of water is at first the property of each person through whose land it flows; but the water may be appropriated by an individual, and after he has enjoyed it for a certain length of time, that enjoyment cannot be interrupted. *691] although it might at first have been prevented. So a man may on his own land erect a house, with windows looking towards his neighbour's premises; at first they may be obstructed, but if no interruption is offered, he may at length prescribe for them as ancient windows, and claim to have them free from obstruction, as in *Bland v. Moseley*, cited in *Aldred's case*, 9 Co. 57. Rule refused.

CAMBRIDGE v. ANDERTON.

Where a ship is so much injured by perils of the sea as not to be repairable at all, or not repairable without an expense exceeding her value when repaired, the assured may recover for a total loss without giving notice of abandonment.

ASSUMPSIT on a policy of assurance on the ship *Commerce*, from Quebec to Bristol, stating a loss by perils of the sea: Plea, general issue. At the trial before ABBOTT, C. J., at the London sittings after last Hilary term, it appeared that the *Commerce*, with a cargo on board, sailed from Quebec on the 8th of July, 1823, and about 220 miles below Quebec got upon rocks in the river St. Lawrence, in foggy and tempestuous weather. She was there much injured, and surveyed by experienced persons, who gave it as their opinion, that the expense of getting her off the place where she was lying, (if that could be accomplished,) and repairing her, would far exceed the value of her when repaired; under these circumstances the captain and the agents for the plaintiff sold the ship, with her certificate of registry. The purchaser did succeed in getting her off the rock, took her back to Quebec and repaired her; she afterwards sailed on a voyage to England, but was lost in the Gulf of St. Lawrence: the plaintiff never gave any notice of abandonment to the underwriters. The lord chief *692] justice told the jury, that if, under the circumstances in evidence, they thought that the ship was not repairable at all, or that when repaired she would not be worth the expense of doing the repairs, the plaintiffs were entitled to recover for a total loss, but that otherwise they could claim for an average loss only. The jury found a verdict for a total loss, and now

The *Attorney-General* moved for a new trial. It may be admitted that under some circumstances the owner has the choice of giving up to the underwriters the thing insured, and claiming a total loss, or he may retain the property and claim for an average loss; but then he should give notice of abandonment in order to indicate his choice. *Hodgson v. Blakistone*, Marsh. Ins. 611; *Martin v. Crockatt*, 14 East, 465; *Bell v. Nixon*, Holt, N. P. C. 423. In the next place, there was not sufficient evidence that it was necessary for the master to sell the vessel. In *Idle v. Royal Exchange Assurance*, 8 Taunt. 755, which came before this court on error, a venire de novo was awarded, because the special verdict did not expressly find that a sale was necessary. Here the ship was certainly greatly injured, but was not a wreck, for she was sold as a ship, with her certificate of registry. [ABBOTT, C. J.

The master had no power to sell the register.] She was afterwards repaired and actually sailed on a voyage to this country.

ABBOTT, C. J. Whether the ship were repairable or not was left as a question to the jury, and I think that they disposed of it correctly. If the subject-matter of insurance remained a ship it was not a total loss, but if it were reduced to a mere congeries of planks, the vessel *was a mere wreck, the name which you may think fit to apply to it cannot alter the nature of [*693 the thing.

BAYLEY, J. I take the legal principle to be this; if, by means of any of the perils insured against, the ship ceases to retain that character and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss, without giving any notice of abandonment. This was decided in *Read v. Bonham*, 3 B. & B. 147, and although RICHARDSON, J., there differed from the rest of the court, that was only upon the facts of the case, and not as to the legal principle upon which it was decided.

HOLROYD, J.(a) Where the damage sustained makes the loss a total loss, it is unnecessary to give notice of abandonment.

Rule refused.(b)

(a) Littledale was in the bail court during the argument, and gave no opinion.

(b) See *Robertson v. Clarke*, 1 Bing. 445.

RAVENGA v. MACKINTOSH.

It is a good defence to an action for a malicious arrest, that the defendant, when he caused the plaintiff to be arrested, acted *bonâ fide* upon the opinion of a legal adviser of competent skill and ability, and believed that he had a good cause of action against the plaintiff. But where it appeared that the party was influenced by an indirect motive in making the arrest, it was held to be properly left to the jury to consider whether he acted *bonâ fide* upon the opinion of his legal adviser, believing that he had a good cause of action.

THIS was an action for a malicious arrest: plea not guilty. At the trial before ABBOTT, C. J., at the London sittings after last Hilary term, the following *facts were given in evidence: The defendant, who was an army [*694 accoutrement maker, resident in London, had, in January, 1822, made a contract with one Mendez, who then acted as the agent of the government of Columbia, to supply and ship for the use of that government a large quantity of arms and accoutrements; the defendant shipped the same, and received in payment of them certain debentures, signed by Mendez, as the agent, and for account of that government. On the arrival of the goods in South America, the Columbian government repudiated the contract, alleging that Mendez had exceeded his authority. In February, 1823, the plaintiff arrived in this country, vested with the character of accredited agent of the Columbian government, and soon after his arrival an application was made to him by the defendant to acknowledge the contract made with Mendez, and to confirm the debentures which had been granted. The plaintiff refused to do this. On the 3d of March the attorney of Mackintosh wrote a letter to Ravenga, stating, that by the laws of this country he was personally liable to pay the debt contracted by the Columbian government, and that if he did not make some satisfactory arrangement proceedings would be taken against him, which would involve him in difficulties. On the 6th of March, Ravenga's attorney replied to this letter, and desired to be furnished with copies of the contract between Mackintosh and Mendez, in order that he might form an opinion whether or not Ravenga was personally responsible. In that letter it was stated that Ravenga was not authorized either to confirm the contract or the debentures, and that the government of Columbia had disapproved of that contract, in consequence of Mendez having exceeded his authority. The *defendant's solicitor refused to furnish any documents. It appeared further, that before the action was [*695

commenced, the defendant laid a case, and all his documents and papers, before a special pleader of considerable experience. One of the queries put in that case was, whether the Columbian government was bound by the contract made by Mendez; another was, whether Ravenga (who at the time when that contract was made, held the office of minister for foreign affairs in the Columbian republic) was personally liable. Another query was, whether, in the event of Mackintosh causing Ravenga to be arrested, an action would lie at the suit of the latter for a malicious arrest, in case it should turn out that he was not liable? Upon this case an opinion was given, first, that the Columbian government was liable; secondly, that Ravenga, as a member of that government, was personally responsible; and thirdly, that an action would not be maintainable by Ravenga against Mackintosh for a malicious arrest, in case the court should be ultimately of opinion that Ravenga was not personally liable. On the 5th of March, 1823, the defendant made an affidavit, that Ravenga was indebted to him in 90,000*l.*, for goods sold and delivered, and on the same day a bill of Middlesex issued. The plaintiff was arrested on the 20th of March, and remained in custody until the 17th of May, when he was discharged upon bail. No further proceedings were taken in the action until Michaelmas term, when a peremptory rule to declare was taken out, and a declaration delivered, but on the 15th of December, a rule to discontinue was taken out, and the defendant paid the taxed costs. Upon this evidence, the lord chief justice directed the

*696] jury to find a verdict for the defendant, if they were of *opinion that, at the time when the arrest was made, Mackintosh acted truly and sincerely upon the faith of the opinion given by his professional adviser, actually believing that Ravenga was personally liable, and that he might be lawfully arrested, and that he (Mackintosh) could recover in that action; but to find for the plaintiff, if they were of opinion that Mackintosh believed that he must fail in the action, and that he intended to use the opinion as a protection, in case the proceedings were afterwards called in question; and that he made the arrest, not with a view of obtaining his debt, but to compel the plaintiff to sanction the debentures. The jury found a verdict for the plaintiff with 250*l.* damages.

The *Attorney-General* now moved for a new trial. In order to maintain this action, the plaintiff is bound to prove first, malice in the defendant; and secondly, that he had no reasonable or probable cause of action. Now, assuming that malice was proved in this case, by showing that Mackintosh was influenced by an indirect motive, in arresting the plaintiff, viz., to induce him to sanction the debentures given by Mendez, still it was incumbent upon the plaintiff to show, that Mackintosh had not any reasonable or probable cause of action against Ravenga. Suppose A. to be indebted to B., and to be in possession of a house, of which B. wishes to obtain possession, and B. threatens to arrest A. unless he consents to give up the house to him, and upon his refusal he does arrest him, could it be contended that such an action as the present could be maintained against B.? [BAYLEY, J. In that case there is an actual debt due; *697] and that being so, there is not only a probable but an actual cause of *action.] But still there is an indirect motive, and consequently, there is malice in the defendant, his object being, not to obtain his debt, but possession of the house. Whether there was probable cause or not is a question of law to be decided by the judge. Bull. N. P. 14. When the facts are doubtful, the evidence may be left to the jury, in order to ascertain the facts; but as soon as they are ascertained, it becomes a question of law, and that question was not decided at the trial of this case. It appeared in evidence, that Mackintosh had a probable cause of action against Ravenga, for he had a debt due to him from the Columbian government; and he was advised, by a person of competent skill and knowledge, that Ravenga, who was a member of that government, was personally liable for that debt. Although, therefore, he had not an actual,

he still had a probable cause of action against Ravenga. He had a reasonable ground for believing that he had a cause of action, and that constituted a probable cause.

BAYLEY, J. I have no doubt that in this case there was a want of probable cause. I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts bonâ fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description. A party, however, may take the opinions of six different persons, of which three are one way and three another. It is therefore a question for the jury, whether he acted bonâ fide on the opinion, believing that he had a cause of action. The jury in this case have found, and there *was abundant evidence to justify them in drawing the conclusion, that the [*698 defendant did not act bonâ fide, and that he did not believe that he had any cause of action whatever. Assuming that the defendant's belief that he had a cause of action would amount to a probable cause, still, after the jury have found that he did not believe that he had any cause of action whatever, the judge would have been bound to say, that he had not reasonable or probable cause of action.

HOLROYD, J. I think the case was left correctly to the jury, and that they have drawn a proper conclusion from the evidence. It is unnecessary to decide in this case, whether a party who acts upon a belief that he has a good cause of action (such belief being founded upon the opinion of a legal adviser of competent skill and ability) but influenced by a malicious motive, can be said to have a reasonable or probable cause of action, when in truth he has no actual cause of action, because the jury here have found that the defendant did not act bonâ fide upon the opinion given, and did not believe that he had any cause of action whatever. Assuming, therefore, that a bonâ fide belief, founded upon the opinion of counsel, that a party had a good cause of action, when in fact he had none, would be sufficient to show that he had a probable cause of action, (upon which, however, I pronounce no opinion,) still in this case, as it must be taken after the finding of the jury, that he did not believe that he had any cause of action, it is quite clear, that there was no probable cause; and that being so, there is no ground for disturbing the verdict.

LITLEDAL, Justice, concurred.

Rule refused.

*WILLIAMS v. GLENISTER.

[*699

Where the parish clerk refused to read in church a notice which was presented to him for that purpose, and the person presenting it, read it himself at a time when no part of the church-service was actually going on: *Held*, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards in order to take him before a magistrate.

TRESPASS for false imprisonment. The declaration stated, that the defendant, at the parish of Tring, &c., assaulted the plaintiff, and took him out of a certain church there, to a certain inn, and there imprisoned him for two hours. Pleas, first, not guilty; secondly, a justification, which was immaterial, as the defendant, being a constable, was entitled to give the whole defence in evidence under the general issue. At the trial before ALEXANDER, C. B., at the last assizes for the county of Hertford, it appeared, that on Sunday, the 24th of August last, the plaintiff presented a notice to the parish clerk at Tring, and desired him to read it. The clerk, after consulting the minister, refused to do so. After the Nicene creed had been read, and whilst the minister was walking from the communion-table to the vestry-room, and no part of the service was then actually going on, the plaintiff stood up in his pew and read the notice, which was to this effect: "Take notice, that a vestry will be held in this church, on, &c., to choose new

churchwardens in the place of the present;" whereupon the minister desired the defendant, a constable, to take him out of the church. The defendant accordingly took him from the church to an inn, where he detained him for an hour after the service was over, and then allowed him to go, upon promising to attend before a neighbouring magistrate the next morning. The plaintiff accordingly did attend there, when he was dismissed by the magistrate, no *700] complaint being made against him. "It was objected for the defendant, that the action would not lie, for that the defendant did no more than he was justified in doing, in order to preserve tranquillity in the church. The lord chief baron told the jury, that although the defendant might be justified in taking the plaintiff out of church, and detaining him till the service was over, yet he had no right to detain him after that time. A verdict having been found for the plaintiff,

Adolphus moved to enter a nonsuit, or have a new trial, and contended, that the defendant was justified in detaining the plaintiff, in order to take him before a magistrate. Immediately after the Nicene creed the rubric has this direction: "Then the curate shall declare unto the people what holy days or fasting days are in the week following to be observed, &c., and nothing shall be proclaimed or published in church, during the time of divine service, but by the minister; nor by him any thing but what is prescribed in the rules of this book, or enjoined by the king, or by the ordinary of the place." The plaintiff, therefore, was clearly guilty of an offence against that direction, and improperly disturbed the congregation, by reading the notice, as proved at the trial. Now, by the 1 M. stat. 2, c. 3, s. 3, it was enacted, "that if any person or persons shall maliciously, wilfully, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble any parson, vicar, parish priest, or curate, or any lawful priest, preparing, saying, doing, singing, ministering, or celebrating the mass, or other such divine service, sacraments, or sacramentals, as was most commonly frequent-

ed and used, in the last year of the reign of H. 8, or that at any time hereafter *701] shall be allowed, set forth, or authorized by the queen's majesty, &c., every such offender and offenders in any the premises, his or their aider, procurer, or abettor, immediately and forthwith after any of the said act or acts, or other the said misdemeanors so committed, done, or made, at any time or times after shall be apprehended and taken by any constable or churchwarden of the said parish, town, or place where the said offence shall be so committed, or by any other officer, or by any other person then being present at the time of the said offence so unlawfully committed; which person or persons so apprehended, with convenient speed shall be brought and carried to any justice of peace within the said shire, or within any city, borough, &c., where the said offence shall be so committed:" and then power is given to the justice to punish the offender. And again, by the 1 W. & M. c. 18, s. 18, it is provided, "that if any person shall willingly and of purpose, maliciously or contemptuously come into any cathedral, parish church, chapel, or other congregation permitted by this act, and disquiet and disturb the same, or misuse any preacher or teacher, such person, upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties, to be bound by recognisance in the penal sum of 50*l.*, and in default of such sureties, shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence, shall suffer the pain and penalty of 20*l.*, to the use of the king." [ABBOTT, C. J. In order to bring the case within those statutes, must it not appear that the disturbance was wilful and malicious?] The act of reading a notice, in the manner and at the time when the plaintiff did it, *702] could not but disturb the congregation; and the law will presume that he intended to effect that which was the necessary consequence of his act.

ABBOTT, C. J. It appears to me, that the 1 M. stat. 2, c. 3, merely gave to VOL. IX.

the common law cognisance of an offence which was before punishable by the ecclesiastical law ; in order to be within that statute, the party must maliciously, wilfully, or of purpose, molest the person celebrating divine service. Had the notice been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister ; but the act having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say that the 1 M. stat 2, c. 3, warranted his detention, in order that he might be taken before a justice of peace. Neither does the case come within the toleration act, 1 W. & M. c. 18. That only applies where the thing is done wilfully, and of purpose maliciously to disturb the congregation or misuse the preacher. The detention of the plaintiff after the time when the service ended, was therefore illegal, and we ought not to disturb the verdict which has been found.

Rule refused.

*BOULTON v. CROWTHER.

[*703]

By the general turnpike act, the trustees of roads are authorized to divert, shorten, alter, or improve the course or path of any of the roads under their management, and divert, shorten, vary, alter, and improve the course or path of any roads through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same ; and through or over any private lands tendering, or making satisfaction to the owners thereof and persons interested therein for the damage sustained thereby : *Held*, that under this clause, the trustees are authorized to lower hills and raise hollows : *Held*, secondly, that the trustees are not liable to an action for a consequential injury resulting from an act which they are authorized to do.

THIS was an action against the defendant, as clerk to the trustees for putting in execution an act of parliament, the 56 G. 3, c. 51, entitled "An act for enlarging the term and powers of several acts so far as relate to the roads from Birmingham through Wednesbury to High Bullen." The declaration charged that the defendant wrongfully and injuriously caused to be banked up, raised and elevated, the highway adjoining the plaintiff's pleasure ground and premises, to a height and level exceeding the previous ancient and accustomed height and level of the highway, and the level of the pleasure ground and premises, and thereby obstructed and stopped up the plaintiff's entrances from the highway through his gates into his pleasure ground ; and that large quantities of gravel, stones, and mud, accumulated in the highway so raised, fell into the plaintiff's pleasure ground and injured his plantations. Plea, not guilty.

At the trial before PARK, J., at the last assizes for the county of Warwick, it appeared that the road mentioned in the declaration, adjoining to the plaintiff's pleasure ground, had been lowered in one part and raised in another by the order of the trustees of the roads ; so that the entrance gates to his premises situate next those parts of the road could not be used by persons coming to his premises with carts *and other carriages ; and that part of the materials [*704] of the road had fallen into the plaintiff's premises, and damaged his hedge and plantations, as alleged in the declaration. Some evidence was given to show that the injury to the plaintiff accrued partly from the work having been done carelessly and negligently ; but it was contended by the plaintiff's counsel, that the plaintiff was entitled to recover whether the work were done carefully or not. By the general turnpike act, 3 G. 4, c. 126, s. 83, "the trustees of turnpike roads were authorized to make, divert, shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management ; and to divert, shorten, vary, alter, and improve the course or path of any of the said several roads through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same ; and through or over any private lands, tendering and making satisfaction

to the owners thereof, and persons interested therein, for the damage that they shall sustain thereby." It was contended, that although the trustees had not taken any of the plaintiff's land, yet as they had rendered it of less value to him in consequence of raising the road in some parts and lowering it in others, they were liable, although the act had not provided a compensation for a consequential damage accruing to a party in a case where no part of his land was taken. The learned judge, however, was of opinion that the action was not maintainable if the trustees used proper care and caution, and did nothing oppressive or arbitrary; and he directed the jury to find for the plaintiff, if they were of opinion that the trustees acted arbitrarily, oppressively, or carelessly; but if they *705] were of a different *opinion, then to find for the defendant. The jury having found a verdict for the defendant,

Jervis now moved for a new trial. The trustees were not justified in doing the act complained of, so as to cause an injury to the plaintiff's property. The act of parliament authorized them in general terms to alter and improve the course or path of the road. They were bound to do that in such a manner as not to injure the property of another. This is distinguishable from the case of the *Plate Glass Company v. Meredith*, 4 T. R. 794, because there the act of parliament authorized the commissioners to pave the street, and it appeared that it could not have been done by any other means than those pursued. Assuming, however, that the act itself was lawful, still as the plaintiff has sustained a consequential damage resulting from that act, the defendant is liable in this action, although the trustees were acting in discharge of a public duty. *Leader v. Moxon*, 3 Wils. 461, 2 Bl. 924, is an authority expressly in point. And in *Roberts v. Read*, 16 East, 215, it seems to have been assumed, that the defendants were liable for a consequential injury resulting from an act done by them in their character of surveyors of the highway. Here, if the road had been diverted through the lands of the plaintiff, the trustees must, under the act of parliament, have tendered satisfaction, not only for the land taken, but for any damage resulting from the road passing through his land.(a) But there is no provision in the act of parliament, by which the trustees are compelled to *706] *compensate for a damage done to the lands of another where the road does not pass through his lands. If, therefore, this action is not maintainable, the plaintiff has sustained an injury for which the law provides no remedy.

ABBOTT, C. J. I think the question left to the jury by the learned judge was the most favourable for the plaintiff that by law he could have propounded and left to their decision. This action was brought against the clerk to the trustees of a turnpike road, for an act which was done by them, which, in some respects, turned out to be injurious to the property of the plaintiff. The case, therefore, presents two questions. First, whether the act done by the trustees was an act which, by the 3 G. 4, c. 126, they were authorized to do; for if they were not authorized to do it, then undoubtedly they would be liable to an action for any injurious consequences resulting from it; but if they were authorized to do what they did, then it raises the question, whether an action can be maintained against persons who, in the execution of a public trust, and for the public benefit, do an act which by law they may do, but which act works some special injury to a particular individual. The first question is, whether the act done was an act which the trustees had an authority to do. Now that depends on the words of the 3 G. 4, c. 126, s. 83. By that section the trustees are authorized, "from time to time, to make, divert, shorten, alter, and improve the course or path of any of the several roads under their care and management, or any part or parts thereof." Now, before this act of parliament *707] passed, the lowering and levelling of hills had become one of the *most common and ordinary modes of improving the course or path of the

public roads ; and when the legislature gave the trustees, in general words, the power to improve the course or path of the public roads, it must be understood as giving them the power to effect that improvement by the usual and ordinary mode, viz., by raising or lowering the roads. If, then, the act of parliament gives an authority in terms to the trustees to alter and improve the course of the path of the roads which are under their care and management, I am clearly of opinion that the lowering of hills in a public road was an act which they were authorized to do under the terms, "improve and alter the course or path of the road." Then, if the act done be an act which they were authorized to do, the next question is, whether any individual who has sustained some special injury from the act done, can maintain an action at the common law. That he cannot, is expressly laid down by Lord KENYON and BULLER, J., in the case of the *Plate Glass Company*. The language used by Lord KENYON is very strong, and also very general. He lays it down as a principle, that if the commissioners act within their jurisdiction, the action at common law cannot be maintained, so that if the statute does not give the individual a remedy, he is without any ; and the same rule is laid down by BULLER, J. It seems to me, that that case is a distinct authority as to the second point now raised. The act of parliament, I think, authorized the trustees to do what they have done. If, in doing the act, they acted arbitrarily, carelessly, or oppressively, the law in my opinion has provided a remedy. But the fact of their having so acted is negatived by the finding of the jury. I am *therefore of opi- [*708
nion, that the defendant was not liable to this action.

BAYLEY, J. I am of the same opinion ; and I think it would be most mischievous if any doubt could be entertained as to the liability of the trustees. The case of *Sutton v. Clarke* resembles the present very closely. There the defendants had a public trust to perform, and a public duty cast upon them by act of parliament ; and it was held, that they having acted without malice, and according to their best skill and diligence in the exercise of a public function which they were compelled to execute, although they had done an act which occasioned consequential damage to a subject, were not liable for such damage. It seems to me, that the learned judge in his address to the jury adhered to the letter of the law as laid down by L. C. J. GIBBS in that case. As to the objection that the learned judge stated to the jury, that the trustees were bound to do what they did, I am of opinion that if they found that a material benefit would result to the public from lowering a hill and filling up a vale ; and that it could be done without any material injury to the individuals whose property adjoined, it was not only a sound exercise of the discretion of the trustees to direct the alteration to be made, but that it was their bounden duty to do so. There can be no doubt that the trustees would have been justified, if, in the exercise of their discretion, they had thought proper to stop up the road entirely, unless it could be shown that it had been originally a parish road, of which there was no proof. In *Leader v. Moxon*, the decision proceeded upon the ground, that the commissioners had exceeded their authority in raising *the pavement so as to obstruct the plaintiff's windows. In this case [*709 it appears to me, that the defendants have not exceeded their authority ; and the jury having found that they did not act arbitrarily, wantonly, or oppressively, I am of opinion, that being public officers having a public duty to perform, they are not liable for a damage resulting to an individual from an act done by them in the discharge of that public duty.

HOLROYD, J. I think that the law was most correctly laid down to the jury by the learned judge. The trustees had a public duty imposed upon them by an act of parliament. The act complained of was done by them in the execution of that duty, and was one which they had a competent authority to do. I am of opinion, that no action will lie for what they have done in the execution of that public duty, unless they exceeded the authority entrusted to them, or

abused that authority, by acting arbitrarily, wantonly, or oppressively, in the mode of carrying it into execution. It would be absurd to hold, that an action would lie against them, for doing an act which they are empowered by act of parliament to do. The act done being itself lawful, can only become unlawful in consequence of the mode in which it is carried into execution; and here the jury have, by their verdict, negatived the fact of the act having been done carelessly, wantonly, or oppressively.

LITLEDALE, J. I also think that this action cannot be maintained. I agree that a private individual must so use his own land as not to injure that of another, but the private individual acts for his own benefit, and he ought not to obtain a benefit at the expense of his neighbour. But where an act of parliament vests a power in *trustees or commissioners, to be exercised by them, *710] not for their own benefit, but for that of the public, and gives no compensation for a damage resulting from an act done by them in the execution of that power, the legislature must be taken to have intended, that an individual should not receive any compensation for the loss resulting to him from an act so done for the public benefit. The plaintiff may have sustained a minute injury in consequence of the act done, but it does not therefore follow that any action is maintainable against the commissioners. Suppose the act of parliament had authorized them to enter upon the land of an individual, and they had entered and done him an injury, by going over the land, I should doubt very much whether any action would be maintainable. Trespass would not be maintainable, because they might justify under the act of parliament, and therefore the act of entry could not be questioned. It might even be doubted, if the act had authorized them to take the land, whether any action would lie against them for taking it. An ejectment would not lie, because the act authorized them to take the land. If any action would be maintainable, it must be assumption, founded upon an implied promise. But surely the law would not imply a promise in them to pay for that from which they derived no benefit, and which the legislature authorized them to take. Here, however, they do not take the land; they only make some alterations in the road, from which a consequential injury arises to the plaintiff. The case of *Leader v. Moxon* is distinguishable from the present, because there the commissioners had exceeded their authority; and in the *Plate Glass Company v. Meredith*, Lord KENYON and *711] BULLER, Js., both say, that "where the act of parliament does not provide for compensation, the action is not maintainable. In *Sutton v. Clarke*, Lord C. J. GIBBS lays it down, that trustees are not liable. In *Jones v. Bird*, 5 Barn. & A. 837, the commissioners were held responsible for an act done by them in the discharge of their duty, but it was expressly found, that they had acted carelessly and negligently. It was assumed, however, that if they had acted with due care, they would not have been responsible. Upon the general principles of law, as well as upon the authorities, I am of opinion that this action is not maintainable.

Rule refused.

DAVEY v. RENTON.

By the statute 43 G. 3, c. 46, s. 3, costs are to be allowed to a defendant arrested without probable cause: *Held*, that the statute does not extend to cases where the defendant pays money into court and the plaintiff takes it out, although it be a much smaller sum than that for which the defendant is helden to bail.

It appeared by the affidavit in this case, that the defendant had been arrested and held to bail, upon an affidavit of debt for 15*l.* and upwards, for goods sold and delivered; that he paid into court the sum of 6*l.*, which was taken out by the plaintiff. The defendant was a baker, and had purchased flour of the plaintiff. On the 14th May, 1821, the accounts between them were settled, and the

balance paid, and a receipt in full given. Subsequently, the plaintiff supplied the defendant with two parcels of flour, amounting to 24l., and the defendant paid 18l. on account of these. On the morning of the day during which the affidavit of debt was sworn, the defendant being entitled to deduct 5s. 6d., for part of the flour which was damaged, tendered to the plaintiff 5l. 14s. 6d. The plaintiff refused to receive this sum, and the defendant afterward paid *6l. into court. The person who was present when the plaintiff had agreed to make the allowance of 5s. 6d. for the damaged flour, died before the money was paid into court.

Hutchinson now moved that the defendant should be allowed his costs, under the stat. 43 G. 3, c. 46, s. 3, the plaintiff not having recovered the amount of the sum for which the defendant had been arrested, and held to special bail, and there having been no probable cause for the arrest. In *Rouvery v. Alefson*, 13 East, 90, where the plaintiff had taken the money out of court, this court refused the rule, on the ground, that there was no vexation in the conduct of the plaintiff. Here the affidavit clearly shows, that there was no probable cause for holding the defendant to bail. In *Laidlaw v. Cockburn*, 2 N. Rep. 76, the court of common pleas granted a rule, under similar circumstances. In *Butler v. Brown*, 1 B. & B. 66, the defendant having paid a smaller sum of money into court than that for which he was arrested, and the plaintiff having taken it out, the court of common pleas discharged a rule nisi for allowing the defendant his costs; but it does not appear that in that case there was any affidavit to show that the plaintiff had not any probable cause for arresting for the larger sum.

ABBOTT, C. J. The decisions on this subject are contradictory; but in the last case all the authorities were before the court of common pleas, and that court was of opinion, that the sense of the word "recover" did not apply to the case of money taken out of court by the plaintiff. It is very desirable to lay it down as a *general rule, that where money is paid into court by the defendant, and taken out by the plaintiff in an early stage of the cause, that that shall not be considered as a sum recovered by the plaintiff, within the meaning of the statute. The fact of the plaintiff's taking the money out of court is not conclusive against his right to recover a larger sum; he may have been induced to accept the smaller sum, to save the expense of litigation. It is the sum accepted by the plaintiff, in lieu of the sum which he might perhaps have recovered if he had proceeded to judgment. We are all of opinion that the statute does not apply to such a case.

Rule refused.

The KING v. The Undertakers of the AIRE and CALDER Navigation.

A poor-rate must show upon the face of it in respect of what property the assessment is made upon each individual charged by the rate.

UPON an appeal, by the undertakers of the Aire and Calder Navigation, against a rate or assessment made for the relief of the poor of the township of Castleford, in the West Riding of the county of York, the sessions confirmed the rate, subject to the opinion of this court, upon the following case. On the rate in question being produced, it appeared, that the property in respect of which the defendants were rated was specified; but with respect to all the other individuals charged thereby, it altogether omitted to state the property in respect of which they were rated. The first of those assessments was as follows:

occupier,	rate,	assessment,
Ashton Joseph;	1l. 8s. 9d.;	2s. 10d.;

and all the other assessments were in a similar form. *It was objected, that it should have appeared by the rate, in respect of what property [714

the assessment was made, and that objection was specifically pointed out by the notice of appeal. The sessions overruled this objection, subject to the opinion of this court. The case then set out the discussion which took place, as to the liability of the defendants to be rated in respect of the property for which they were charged; but it became immaterial, as the court decided the case upon the first point.

Blackburn and Bland, in support of the order of sessions. The rate was sufficiently certain; the word "occupier" over the name of the party rated, shows that he was charged in respect of real property; and in charging the occupier, the very words of the 43 Eliz. c. 2, have been followed. That statute does not require that the description of property should appear in the rate. (a) The form adopted in this case is the one given in Burn's Justice, tit. *Poor Rate*; and if it be necessary to insert each description of property, it will, in large parishes, swell the rate to a very inconvenient size.

ABBOTT, C. J. The objection to the form of the rate is decisive. If any person wished to appeal, on the ground that another was underrated, how could he tell in respect of what property the rate was imposed?

Order of sessions quashed.

Scarlett and Alderson were to have argued against the rate.

(a) By the first section of that act power is given to raise weekly or otherwise "(by taxation of every inhabitant, person, vicar, and other, and of every occupier of lands, houses, tithes impropriate, appropriations of tithes, coal-mines, or saleable underwoods in the said parish, in such competent sum and sums of money as they shall think fit)," a convenient stock, &c.

*715] *The KING v. The Inhabitants of POLESWORTH.

An agreement was made between A. and B. that the latter should serve for three years at 1s. per day when B. had work to do, and when he had no work, A. was not to be paid. At the time when the agreement was made, the master told the servant that he should not have work for him during the whole year, and particularly during the winter, and that when he had not work for him he might get work from other people: *Held*, that this was an exceptive hiring, and that the pauper having worked for other people during the winter season when his master had no work, and having at other times worked for his master during two successive years, did not gain a settlement.

Upon appeal, against an order of two justices, whereby Hannah Brindley was removed from the parish of Polesworth, in the county of Warwick, to the parish of Saint Peter, in the parish of Derby, in the county of Derby, the sessions quashed the order, subject to the opinion of the court on the following case:

The pauper derived her settlement from her father, William Brindley, who being legally settled in the parish of Saint Peter's, Derby, in December, 1784, agreed with one William Boolows, his uncle, then resident in the parish of Polesworth, to serve him for three years, at 1s. per day, when he had work for him to do; and when he had not work for him he was not to be paid; Boolows told him at the same time he should not have work for him all the year round, particularly in the winter, and that when he had not work for him he might get work from other people. After making the agreement, William Brindley went to work in the collieries, until the spring of the year 1785, and then went to work with his uncle, according to the agreement, and remained with him about nine months, when his uncle told him he had no employment for him, and he went and worked several weeks with a Mr. Barrett, of Pooley Hall, as a labouring man, and after that, his uncle having again work, he returned to him, and continued to work for him about nine months longer, when he quitted him without his leave and went to Birmingham, from whence

*716] *he never returned to his service. He never received any wages from his uncle when he did no work for him, and never accounted with him for any wages he received from other people when absent from his service.

Reader, in support of the order of sessions. This case is not distinguishable from *Rex v. Martham*, 1 East, 239. There the pauper agreed to serve for three years, at weekly wages, with a proviso, that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionable deduction of wages. It was held, that he gained a settlement by serving a year under that hiring.

Goulburn, contra, was stopped by the court.

ABBOTT, C. J. In this case the master tells the pauper at the time when he is hired, that he shall not have work for him all the year round, particularly in the winter, and when he had not work for him, he might get work from other people. This is merely a hiring for so much of the year as the master has work for him. He has the control over the servant so long as there is work for him. As soon as there is no work the servant ceases to be under the control of the master, and is at liberty to get work elsewhere. We are all of opinion, that there was not any hiring for a year.

Order of sessions quashed.

*The KING v. SAMUEL CLARK MARSH.

[*717

an an information on the 5 Ann. c. 14, s. 2, against a carrier between Norwich and London, for having game in his possession *as carrier*, it is not necessary to aver that the defendant is not a person qualified to kill game, nor that he had the game in his possession *knowingly*. The evidence for the prosecution was, that game was found in the defendant's wagon at an intermediate place between Norwich and London: *Held*, that there was sufficient *prima facie* evidence that the defendant had it in his possession *as carrier*. The evidence for the defendant was, that his book-keeper living at that place did not know of any game having been put in there. Neither the driver of the wagon or his assistant was called as a witness: *Held*, that this evidence did not vary the case, and that the defendant was properly convicted of having the game in his possession *as carrier*.

THIS was a conviction against a carrier, for having game in his possession. The conviction stated, that Edward Howell, of Thetford, St. Peter's, in the county of Norfolk, came before A. B. and C. D., justices, and gave them to understand and be informed, that within three months last past, viz. on August 25th, 1823, Samuel Clarke Marsh, of the city of Norwich, being a common carrier, unlawfully had in his hands and custody and possession as such carrier, divers, to wit, twenty-two partridges and twenty-two pheasants of the game of England, (such partridges and pheasants not having been sent up nor delivered or entrusted to the said S. C. Marsh, as such carrier as aforesaid, or in anywise howsoever, by any person or persons, in any manner qualified to kill game,) contrary to the statute, &c. The conviction then stated the summons of the defendant, his appearance, and that he pleaded not guilty. The following evidence, given by two witnesses for the prosecution, was then set out; that defendant was a common carrier, and that his wagon stopped in the parish of Elden, in the county of Suffolk, and that twenty-two live pheasants, two live partridges, and twenty dead ones, were in the wagon, and in the possession of the defendant, as such common carrier. The conviction then set out the evidence of *one John Cole, a witness for the defendant, who stated, that [*718 he was in the employment of the defendant, as book-keeper on the day in question; that his master's wagon stopped that day at Thetford, on its way to London, and that he, Cole, saw the wagon at about six o'clock in the evening; that it stopped about an hour afterwards; that he saw nothing put into it, except a parcel, which he booked, (which was not the parcel in question;) that the wagon had been in Thetford some time before he saw it, and that he did not know what might have been put into it before he saw it; that James Smith was the driver of the said wagon, who was accustomed to drive it; that he had not seen him since that time; that one Evans was with the said James Smith as helper; that he did not examine the wagon, nor did he know what was in

it; that he did not see any Norwich way-bill, nor was he accustomed to see one, unless any goods were left at Thetford; that the said S. C. Marsh lived at Norwich, which is his constant residence; that he never saw him at Thetford, to see what was put into his said wagon; and that it was impossible for the said S. C. Marsh, if his wagoner or book-keeper put any thing into the wagon at Thetford or on the road, to know of it, unless he was informed of it; that the wagon came into Thetford considerably loaded, but that he, John Cole, did not know what was in it; that he was dismissed from his master's service about a week after the 25th of August, on account of the game found in the wagon on that day, and he had not been since employed by the said S. C. Marsh; that he and his father had been book-keepers to S. C. Marsh, for forty years before. The conviction then stated, that, inasmuch as the defendant had not

*719] adduced any evidence of the said pheasants and partridges having been sent as aforesaid, by any person or persons qualified to kill game, nor any evidence that the defendant was qualified, by the laws of the realm, to kill or destroy game, or to have the said pheasants or partridges in his possession as aforesaid; it appeared to the justices that the defendant was guilty of the premises charged upon him in the information, and that they therefore adjudged him guilty of the offence.

Nolan and *Chitty* were to have argued in support of the conviction, but the court called upon

Scarlett, contra, who contended, that the information ought to have negatived the qualification of the defendant, and also to have averred that he had the game in his possession *knowingly*. As to the first objection, the uniform course of the precedents of convictions against carriers, is to negative the qualification. *Rex v. Turner*, 5 M. & S. 206. It is consistent with this information that the carrier in this case may have been a qualified person, and may actually have sent his own game by his own wagon; and if so, he clearly would not have committed an offence within the act. [ABBOTT, C. J. Then he would not have had the game in his possession *as carrier*.] [BAYLEY, J. The effect of your argument is, that if the carrier be qualified to kill game, he may carry the game of any person whatever, whereas the 5 Anne, c. 14, s. 2, declares "that any carrier having game in his possession is guilty of an offence, unless

*720] it be sent by a qualified person." The information ought to have alleged, that the defendant had the game in his possession *knowingly*. The fact of his having it in his possession without knowledge, cannot be an offence. Thirdly, the evidence does not show that he had it in his possession *knowingly*. The bare fact of the goods having been found in his wagon is not *prima facie* evidence that he knew them to be there, and the knowledge of the servant is not sufficient; for a master is not criminally responsible for the acts of his servant; and there is no evidence to show, that the parcel was put into the wagon at Norwich, where the defendant resided; and if it were put in at an intermediate place, it is impossible that he could have any knowledge of it.

ABBOTT, C. J. I am of opinion that this conviction ought to be affirmed. Two objections have been taken to the form of the information. The first is, that it does not negative the qualification of the defendant. The second is, that it does not aver that the defendant had the game in his possession *knowingly*. As to the first objection, I am of opinion that it is unnecessary in an information against a carrier to negative the qualifications of the defendant. For whether he be qualified or not, if he has the game in his possession in the course of his trade and business as carrier, it is an offence within the act. If that were not so, an unqualified carrier would incur the penalty by carrying the game of other people not qualified, and a qualified carrier would not, although each were doing the very same act. It is the act of carrying the game of persons not qualified that constitutes the offence. As to the second objection, I am of opinion that it is not necessary that the information should allege that the defendant

had the "game in his possession *knowingly*. The 5 Anne, c. 14, s. 2, [721 has no such word. It merely says, "if the carrier have any pheasant in his possession he shall be convicted." If it were necessary to aver that the defendant had actual knowledge, it would cast on the prosecutor a burden of proof which could not easily be satisfied, particularly as the carriers themselves usually residing in one place, cannot have any actual knowledge of that which may be done by their servants in the course of a long journey. I am of opinion that it is not a sufficient defence for a carrier, in any case of this description, to show that he did not know that the particular parcel contained game, although it might be a good defence to show that it was put into the wagon by the servant for his own benefit, and contrary to the orders of, and in fraud of his master. As to the evidence, that was entirely for the consideration of the justices, but I think there was sufficient evidence to justify the conviction. It appeared that the hampers containing the game were in the defendant's possession, in his wagon employed in his business. That was, therefore, *prima facie* evidence that the game was in his possession *as carrier*. And that was not rebutted by the evidence given for the defendant. For it appears merely that the book-keeper at Thetford, at an intermediate place between Norwich and London, did not know of any game having been put into the wagon there. The Norwich way-bill was not produced, and the game may therefore have been put into the wagon at Norwich with the actual knowledge of the defendant. Neither the wagoner nor his helper was called as a witness. The evidence for the defendant left the case, therefore, just where the evidence for the prosecution left it. That being so, I am of opinion that there was [722 evidence that the defendant had the game in his possession *as carrier*, and therefore, that this conviction ought to be affirmed.

BAXLEY, J. The general rule as to convictions is this. The information must bring the case within the clause imposing the penalty. If that contained the qualification, the information ought to have negatived it. Now, trying this case by that rule, it was not necessary to negative the qualification or to affirm knowledge. The words of the clause imposing the penalty are not, if any *unqualified* carrier, but "if any carrier shall have game in his possession, such carrier (unless the game be sent expressly by a person qualified to kill game) shall be convicted." Then as to knowledge, the clause itself says nothing about it. If that had been introduced, evidence to establish knowledge must have been given on the part of the prosecutor; but under this enactment, the party charged must show a degree of ignorance sufficient to excuse him. Here there was *prima facie* evidence, that the game was in his possession *as carrier*. Then it lay on the defendant to rebut that evidence, and in considering how it was to be rebutted, we should consider how it might have been rebutted. The evidence for the defendant was, that a book-keeper living at Thetford, an intermediate place on the journey, did not know of the parcel having been put into the wagon. It might either have been put in with the assent of the carrier, or in fraud of him by his servants. The way-bill made out at Norwich ought to have been produced to show that it was not put in with the assent of the master, or some evidence should have been given to show that the game was put into the wagon contrary to the order of the defendant, and for the benefit [723 of his servant; and no such evidence having been given, I think the defendant was properly convicted.

LITLEDALE, J. I am of opinion, that it is not necessary in an information against a carrier for having game in his possession to negative the qualification of the defendant. The 5 Anne, c. 14, s. 2, creates this offence, and it does not except the case of a carrier who is himself qualified to kill game. The clause does contain one exception, and that shows that it was not intended that any other exception should be allowed. I think, therefore, that it would not be any defence to a charge against a person for having game in his possession as a car-

rier, to show that he was a person qualified to kill game. If he could show, indeed, that it was his own game, that would negative the fact of his having it in his possession in his character of a common carrier. The fourth section makes it an offence for persons not qualified to keep greyhounds, &c., or other engines to kill or destroy game, but nothing is said in the second section as to the qualification. I doubt much whether it would be any defence upon the merits that the defendant himself did not know that the particular parcel contained game. A master in some cases is answerable criminally for the act of his servant, when the act is done by the servant for the benefit of the master and in the course of his employment. Thus if a servant in the course of his employment sells a libel, the master is subject to an indictment. I think that, in this case, the master was properly convicted. The game was found in his wagon, employed in the course of his business as a carrier. That raises a presumption *prima facie*, that he knew it was there, and that is not rebutted [724] by the evidence given on the part of the defendant. Generally speaking, it is sufficient in an indictment or a declaration founded upon a statute, to pursue the words of the statute. Thus in an action of debt for using a gun with intent to destroy game, it is sufficient to aver generally that the defendant is not a qualified person. It has been held necessary indeed, to negative in informations the particular qualifications. It is not necessary to inquire whether that rule were wisely introduced or not, for the word *knowingly* is not in the act at all. Therefore, according to the rule above laid down, it need not be stated in the information.

For these reasons I am of opinion the conviction ought to be affirmed.

Conviction affirmed.

The KING v. The Inhabitants of NORTHWEALD BASSETT.

A widow, before assignment of dower, has not such an interest in the land of which she is dowerable, as to be irremovable from the parish in which the land lies.

MILLCENT REYNOLDS, widow, and her six children, were removed, by an order of two justices, from the parish of Northweald Bassett, in the county of Essex, to the parish of Magdalen Laver. Upon appeal, the order was quashed, subject to the opinion of this court upon the following case :

Richard Reynolds, the pauper's husband, died in May, 1822, seised of a freehold estate liable to dower in Northweald Bassett. Dower was not barred, but it has not been assigned, nor have any steps been taken for that purpose.

[725] The heir at law has been from the time of his birth an idiot, and at Richard's death was twenty-one years of age. In the year 1820, long after the marriage of Richard and Millicent, the estate was mortgaged for a term of 1000 years by Richard, to secure the payment of 100*l*. The mortgagee received from the tenant the full half-year's rent, which accrued after the death of Richard at Michaelmas last, out of which he paid the sum of 3*l*. to the pauper M., and took from her the following receipt: "The 7th December, 1822, received of the heir at law of my late husband, R. Reynolds, deceased, the sum of 3*l*., by the payment of Richard Hauchin, (the tenant,) being my third share, as his widow, of the half-year's rent of the freehold part of his estate at Thornwood common, in Northweald Bassett, due Michaelmas last." R. R. lived in Magdalen Laver, and after his death the pauper, his widow, resided in that parish for some months, and then hired and lived in a cottage in Northweald Bassett, which was not on the husband's estate. Before her residence of forty days had been completed in that parish, she became chargeable, and was removed.

Broderick and *Stephen* in support of the order of sessions. The question here is, whether the magistrates had power to remove the pauper, not whether her residence in Northweald Bassett was such as would confer a settlement.

For it does not necessarily follow, that a person is removable if the residence will not confer a settlement, *Rex v. Leeds*, 2 Bott. 147. The statute 12 & 13 Car. 2, c. 12, gives the power of removal, and the question will be, whether the pauper in this case had such an interest in the land as to except her out of the operation of that act. A person purchasing land in any parish for less than 30*l.* would not thereby gain a settlement, but would be irremovable if he chose to reside in that parish. It may therefore be admitted, that in this case the widow had no legal estate, dower not having been assigned, nor could her residence in Northweald Bassett be deemed her quarantine, because it did not immediately follow the death of her husband; the case, therefore, is not decided by *Rex v. Painswick*, Burr. S. C. 783, or *Rex v. Long Wittenham*, 2 Bott. 531. It comes, however, within the principle of *Rex v. Horsley*, 8 East, 405, where it was held that the sole next of kin had such an equitable interest in a leasehold estate, that she gained a settlement by residing forty days in the parish after the intestate's death, although before administration granted to her. So here the widow had the exclusive right to have dower assigned to her, and might have obtained the legal estate by writ of dower, or by an application to the court of chancery. *Rex v. Painswick* may be cited as an authority, that a mere right of dower will not be sufficient, but it is important to inquire how the law stood at the time when that case was decided. Lord Mansfield says, "The mere right of dower has been likened to the case of a next of kin who cannot acquire a settlement before administration granted." But it having been decided in *Rex v. Horsley*, that a sole next of kin is irremovable before administration, if the cases are to be likened to each other, it follows that a widow is irremovable before dower assigned. [ABBOTT, C. J. The widow would be a trespasser if she entered on the land before the assignment of *dower.] The title of the widow to dower is consummate on the death of her husband, the assignment is a mere form. And, although [727 the right of entry is suspended until the assignment has been made, that is merely for convenience, and not because there is an adverse right, as where an estate tail is discontinued. Secondly, the pauper was in the actual receipt of a part of the rent, which was paid to her as dower, that is equivalent to an assignment. The want of a formal assignment of dower is nothing in equity, *Duke of Hamilton v. Mohun*, 1 P. W. 122. [ABBOTT, C. J. The payment in this case was made by the mortgagee, who had not power to bind the heir.]

Marryat, (with whom were *Jessop* and *Knox*.) *contra*. Until the assignment of dower, the widow had no such interest as could give her a settlement or make her irremovable. It may be admitted that a person may be irremovable, although not in a situation to gain a settlement by residence, but that must be, because he cannot be taken away from his own. All the decisions upon questions of settlement by estate have turned upon the pauper's right of possession. In *Rex v. Horsley*, the pauper had the sole right of possession, no adverse interest could be obtained without her consent. Here, the title to the freehold was in the heir, he might have taken possession, and no person could dispute his right. The widow, indeed, had a right to a portion for dower, but there is a great difference between a right to something in possession, and a right to have something assigned. (He was then stopped by the court.)

*ABBOTT, C. J. The case of *Rex v. Painswick* was stronger in favour of the settlement claimed than the present case; for there the pauper had actually resided upon the property, out of which the claim to a settlement arose. I think it is our safest course to abide by that decision. If we consider the nature of the widow's right to dower before assignment, it will be seen that she had not any right either legal or equitable to the land. Her legal right was to have dower assigned, her equitable right to have an account of the rents and profits. But in *Rex v. Berkswell*, 1 B. & C. 542, a right of that nature was held insufficient to confer a settlement. Upon the authority of those

two cases, but particularly the former, that being a case of dower, I am of opinion that the widow of Richard Reynolds had not any right to reside in the pariah of Northweald Bassett, and that the order of sessions must be quashed.

Order of sessions quashed.

*729]

*MORGAN v. PALMER.

In assumpsit for money had and received, it was proved that Yarmouth has been a borough from time immemorial, and that until the time of Queen Anne the chief officers of the corporation were two bailiffs; and various charters had confirmed to them all the fees before received by them. By stat. 1 Ann. st. 2, c. 7, all fees payable to the bailiffs were to become payable to the mayor when the style of the corporation should be changed, which was done by charter in the following year. At a meeting duly holden before the defendant, then mayor, (he being by virtue of his office a justice of peace,) and another justice, for granting and renewing the licenses of publicans, the plaintiff applied to have his license renewed, and upon having it done, was required to pay, amongst other fees, the sum of 4s. to the mayor, which was proved to have been regularly paid for a period of sixty-five years: *Held*, first, that the defendant was not entitled to take any such fee; for the payment for sixty-five years did not raise a presumption that it had been immemorially paid to the bailiffs or mayor of Yarmouth, inasmuch as licenses were not granted until the reign of Ed. 6, and the defendant, as justice of peace, was not entitled to any fee for granting the license. Secondly, that the defendant was not entitled under the 24 G. 2, c. 44, to notice of the action about to be brought against him, for that the fee could not have been taken by him as a justice, *colore officii*. Thirdly, that the payment was not voluntary so as to preclude the plaintiff from recovering the money in this action.

ASSUMPSIT to recover a sum of 4s. paid by the plaintiff, who is a publican in the borough of Great Yarmouth, to the defendant as mayor of that borough, and claimed by the defendant as having become due to him on granting to the plaintiff his annual license as a publican. At the trial before GARROW, B., at the Norfolk Lent assizes, 1823, a verdict was found for the plaintiff, subject to the opinion of this court on the following case. In the month of September, 1822, a meeting was duly held by the defendant, (who, in his character of mayor, was then one of the justices of the peace in and for the borough,) and by another justice of the peace in and for the borough, for the purpose of renewing the annual licenses of the publicans in the borough. The plaintiff attended at that meeting in order to obtain a renewal of his license, and the clerk to the justices, who is also town-clerk, and clerk of the peace for the borough, on granting to the plaintiff his license, demanded a sum of 12s. 6d., which the plaintiff accordingly paid. The clerk then paid over to the defendant a sum of *730] 4s., part of the sum of 12s. 6d. which he had *received, on the account and by the authority of the defendant as mayor; he also paid over a sum of 2s., other part of the said 12s. 6d., to the serjeant at mace, and retained the sum of 4s. 6d. as clerk of the justices, and 2s., the residue thereof, to his own use as clerk of the peace. Great Yarmouth is an ancient and immemorial borough. Until the reign of Queen Anne the chief officers of the corporation were two bailiffs. Various charters, from the reign of King John to that of Queen Anne, granted to the bailiffs all ancient and usual perquisites, fines, emoluments, and profits, which they had before by pretext of any incorporation, or by reason or pretence of any prescription, use, or custom held, enjoyed, or used. By stat. 1 Anne, st. 2, c. 7, it was enacted, "that when the style of the corporation should be changed from that of bailiffs, aldermen, burgesses, and commonalty, to that of mayor, aldermen, burgesses, and commonalty; the mayor and his successors should have and enjoy all the same fees, perquisites, privileges, and jurisdictions, as the bailiffs had before lawfully and rightfully claimed and demanded." By a charter in the year following, the style of the corporation was changed, and it was thereby provided, that the first mayor therein named and his successors should have and enjoy the same powers, privileges, fees, perquisites, and profits, as the bailiffs in any manner had before held and enjoyed within the liberties and precincts of the said borough. No entries were made of the sums paid for licenses in the books of the corporation,

but as far back as living memory went, that is to say, from 1765 up to the time of bringing this action, the same sum of 4s. had been uniformly received by the mayor for the time being from every publican applying for a license, as his *usual and accustomed fee for granting it. No notice of the action [*731 was given previously to its commencement. The questions for the opinion of the court were, first, whether the plaintiff was bound to give notice of the action previously to bringing the same; second, whether the defendant was entitled to receive the said sum of 4s.; third, whether the plaintiff, having paid the said sum of 4s. in the manner above stated, was entitled to recover it back in this action. The case was now argued by

Rolfe for the plaintiff. The defendant was not entitled to claim the money in dispute, and the plaintiff may recover it back in this form of action, without giving notice under the 24 G. 2, c. 44. The licensing of public houses arose out of the 5 & 6 Ed. 6, c. 25, and neither that or any subsequent statute on the subject authorizes the taking such a fee as was demanded by this defendant. If it be legal, the legality must depend upon something not found in any statute. It is certainly found that the borough of Yarmouth is a borough by prescription, and that a charter was granted in the 2 Anne; but that only leaves the matter in the same situation as before, giving no other fees to the mayor than those which were before lawfully payable to the bailiffs. It must be contended on the other side, that before the introduction of statutable licensing, this fee might have been claimed for some customary licensing in this borough. (He was then stopped by the court as to that point.) Then as to the notice, the 24 G. 2, c. 44, does not extend to an action for money had and received, as appears by *Umphelby v. McClean*, 1 B. & A. 42, which was an action against *collectors of taxes, to recover the amount of excessive charges made [*732 by them. The 43 G. 3, c. 99, requires notice to be given before any action is brought for any thing done in pursuance of that act; and Lord ELLENBOROUGH held, that it only applied to an act done, and not to such an action as was then before the court. As to the third point, whether the money may be recovered in this action, it may perhaps be argued that it cannot, on the ground that the payment was voluntary. But that principle does not apply here, for the parties were not upon equal terms, the publican was under a species of duress, *Astley v. Reynolds*, 2 Str. 915; *Dew v. Parsons*, 2 B. & A. 562.

Dover, contra. If it be equivocal whether the money was paid to the defendant in his character of justice or not, he was entitled to a month's notice before the action was commenced against him, *Briggs v. Evelyn*, 2 H. Bl. 114. *Greenway v. Hurd*, 4 T. R. 553, determined on the 23 G. 3, c. 70, s. 30, may also be considered as an authority on this point. [BAYLEY, J. It was clear there that the defendant had received the money on a supposition, that he was entitled to receive it in the discharge of his duty as an excise officer, for he had paid it over to his superior.] The words of the 24 G. 2, c. 44, are very large, and apply to every thing done in execution of the office of a magistrate. [HOLROYD, J. The thing here done in execution of the office, was the granting of the license, not the taking of the fee.] Then this may be considered as an immemorial fee payable upon a good consideration, viz., the trouble of making out the license. Proof of the *existence of an usage for a much [*733 shorter period than sixty-five years, the time spoken to in this case, has been held sufficient to establish an immemorial usage, *Rex v. Joliffe*, 2 B. & C. 54. It appears that alehouses existed long before the time of Ed. 6, from the statute first requiring that they should be licensed. There may, therefore, have been some form of permission to keep an alehouse granted in this borough before that time, and a fee may have been lawfully taken for it. Now all fees, before payable, were confined by the stat. 1 Anne, and the charter 2 Anne. Thirdly, the payment was made by the plaintiff voluntarily with a full knowledge of all the circumstances; he cannot, therefore, now recover it back, *Knibbs*

v. *Hall*, 1 Esp. 84; *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143.

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to recover in this action. The first and main question is, whether the defendant had any legal authority to demand the money in dispute. It has been conceded, that it must be due to him as mayor, independently of his character of justice of peace. And, indeed, it could not be put on any other ground, for the money is claimed as an immemorial payment, and the interference of justices of peace in granting licenses clearly arose since the time of legal memory. It is found that the payment was claimed for granting a license and that it has been taken for a long period of time. We cannot, however, thence presume that the mayor was entitled to the payment by any immemorial usage, *because we know that
*734] licenses to open public houses were not granted until long after the time of legal memory. At common law any person might, if he pleased, open a house for the entertainment of travellers and others. It is unnecessary for us to consider, whether a custom existing in any particular place restrictive of the privileges conferred by the common law would be legal or not; for no such custom is shown in this case; and if any power had been vested in this corporation to grant licenses before the 5 & 6 Ed. 6, I should have expected to find some evidence of such a privilege. I studiously avoid giving any opinion whether such a custom, if proved to exist, would or would not be good in law. This, however, should be remembered, that a custom to narrow the privilege of the subject must be established by clear evidence. As to the second point, whether the defendant was entitled to notice of action; if it be conceded that the money was taken by him in his character of mayor, independent of that of a justice of peace, then the 24 G. 2, c. 44, does not apply. If it was taken in the character of justice, or if it were equivocal in which capacity the claim was made, then according to the case of *Briggs v. Evelyn*, if the act were done *colore officii*, notice of action must have been given. But the object of that statute was to protect justices accidentally committing an error in the discharge of their official duties, and not where the thing is done for their own personal benefit. This money was taken for the latter purpose, and that removes all doubt as to the necessity of notice. Then as to the last point. It has been well argued that the payment having been voluntary, it cannot be recovered
*735] back in an action for money had and received. I agree that such a *consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, "that which you require shall not be done except upon the conditions which I choose to impose," no person can contend that they stand upon any thing like an equal footing. Such was the situation of the parties to this action. The case is therefore very different from *Brisbane v. Dacres*, and our judgment must be in favour of the plaintiff.

BAYLEY, J. I am of opinion, that the defendant was not entitled to any fee for granting a license to the plaintiff; that the latter is entitled to recover it back in an action for money had and received, and that the defendant was not entitled to a month's notice of that action before it was commenced. The defendant must have taken the fee as mayor, he had no pretence for claiming it as a justice of peace. If it had been found by the jury that, by immemorial custom, no person could carry on trade in the borough of Yarmouth without a license from the corporation, even supposing such a custom to be good, the money would have been received for the use of the corporation. There is not, however, any thing to show the existence of such a custom, and the money was received for the individual benefit of the defendant as mayor. As a justice he had a public duty to perform, and had no right to any remuneration for it. Then, as to the question whether the money can be recovered in this action; if it had been a free and voluntary payment, there might be some difficulty;

but I entirely agree with the observations of my lord chief justice, which show, that the payment was by no means voluntary. There is also another *ground upon which it might be put, viz., that as the defendant had a discretion to exercise in granting or refusing licenses, it would be against public policy to allow him to receive fees, by which he might be biased in the exercise of that discretion; and if so, the objection that this was a free and voluntary payment is inapplicable. As to the notice, I am of opinion, that as mayor the defendant was not entitled to it. The statute does not apply, unless the act were done by him as a justice; but in the latter capacity he had no pretence for claiming any thing. It is, therefore, impossible to say that the money was taken *colore officii*. The case of *Irving v. Wilson*, 4 T. R. 485, puts the question upon the right principle. There, an excise officer had improperly made a seizure of certain goods, and refused to restore them until the plaintiff paid him a sum of money; and it was held, that that money might be recovered in an action for money had and received, and that it was not necessary to give notice of the action, under the 23 G. 3, c. 70, s. 30. For these reasons, I think that the plaintiff must have the judgment of the court.

HOLROYD, J. By the common law, a license to sell ale was not necessary, and I think that there is not any evidence of an immemorial usage or custom in this borough, from which we can infer that such licenses were granted there. Without such a custom, the only ground upon which licenses are granted, is the 5 & 6 Ed. 6, c. 25. But neither that or any other statute authorizes the receipt of money by the person in whose discretion the granting of such licenses is placed. Whether a custom *to take money for the exercise of such a discretion would be good in law, is, I think, very doubtful, for the reasons given by my brother BAYLEY. In this case the license is stated to have been granted by the defendant, the mayor of the borough, and another justice. It is clear, therefore, that they must have acted as justices, and as such, their only power of granting licenses is given by the statute before mentioned. There was not, then, any pretence for claiming the payment in question. Neither was it necessary to give notice of the intended action. If the money had been taken by persons in the execution of their duty as justices, as for instance upon a conviction, then the case of *Greenway v. Hurd* would have applied, and notice would have been necessary. But this case is very different; for, even supposing that the defendant took the money in consequence of having done some act as a justice, (and it should be remembered, that although two justices acted, yet the money was taken by the defendant for himself alone,) still it could not be considered as taken in the execution of his office; and therefore, according to *Irving v. Wilson*, he would not be entitled to notice. Thirdly, I think that the money may be recovered in this action, and that it does not fall within that class of cases which apply to voluntary payments.

LITLEDALE, J. I am of opinion that this defendant has no right to retain the money which was paid to him by the plaintiff. He had not any legal authority to make the charge, either as mayor of the borough or as a justice of peace. The granting a license was a public duty imposed by law, and for the execution of that he had no right to any payment. The claim can only *be justified by immemorial usage, or by act of parliament. There is no statute authorizing the claim, and the usage for sixty-five years, proved in this case, is not evidence of an immemorial usage. In *Rex v. Joliffe* the usage applied to a court-leet, which had existed from time immemorial; and therefore, when that usage was shown to have prevailed for twenty years, and there was not any thing to show that any other usage had ever existed, it was reasonable to presume, that that which had existed for twenty years had existed as long as the court-leet itself. But here, the granting of licenses is of modern introduction, and cannot be traced further back than the reign of Ed. 6. As to the notice which it is said should have been given, even supposing the

defendant to have made the claim in his capacity of justice of peace, that was not done in the execution of his office. Where a justice orders a man to be apprehended, or his goods to be seized under a warrant, that is done in the execution of his office; and if the goods were afterwards sold, it might be necessary to give notice before an action could be commenced to recover the proceeds. Notice might also be requisite if the party paid money in order to be relieved from some threatened proceeding by a justice; but here, it cannot be pretended that the thing was done in the execution of the defendant's office. If, according to the usual course, the plaintiff was entitled to a license, the defendant was bound to grant it. The granting it was in the execution of his office, but the claim of a fee for so doing certainly was not. Then comes the objection, that this was a voluntary payment. In *Bilbie v. Lumley*; *Brisbane v. Dacres*, and *Knibb v. Hall*, both parties might, to a certain extent, be considered as actors. *Here, the plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his license. I think, therefore, that he is entitled to recover it back in this action. Judgment for the plaintiff.

The KING v. The Inhabitants of HALLOW.

Where a master, who had hired a servant for a year, at the expiration of eleven months made a complaint against him before a justice of peace, and the latter, under the provisions of the 20 G. 2, c. 19, s. 2, committed the servant to the house of correction for one calendar month, which did not expire until after the end of the year for which he had been hired: *Held*, that this was an abiding in the master's service for a whole year within the meaning of the 8 & 9 W. 3, c. 30, and that the servant thereby gained a settlement.

UPON an appeal, against an order of two justices, for the removal of Thomas Hewett, Elizabeth his wife, and their two children, from the parish of Powick, in the county of Worcester, to the parish of Hallow, in the same county, the sessions confirmed the order, subject to the opinion of the court of King's Bench, upon the following case. The pauper, Thomas Hewett, gained a settlement in the parish of Hallow, about fourteen years ago, by a hiring and service for a year in that parish. At the expiration of that service the pauper went into the service of one John Price, of the parish of Tibberton, in the said county, having been previously hired by John Price, at Pershore Mop, a few days before Old Michaelmas, when the pauper's service in Hallow expired, to serve him the said John Price, as wagoner's boy, from the said Old Michaelmas to the Old Michaelmas following, at the wages of 5*l*. The pauper went into the service of the said John Price, according to this hiring, and remained with him, serving in the parish of Tibberton, till about a month before the Old Michaelmas-day at which his service with John Price was to end, according to the said hiring; when disputes having arisen between John Price and the pauper, in consequence of his having charged the pauper with misconduct, John Price caused the pauper to be summoned to answer such charges before P. G., one of the justices of the peace for the county of Worcester. John Price and the pauper appeared before P. G., and the complaint was accordingly heard, and upon the hearing it was agreed between P. G. so being such justice as aforesaid, and John Price, that the pauper should either beg his (John Price's) pardon, and be received back into his service again, or if the pauper refused to beg his pardon, that he should remain the rest of his year in prison. The pauper refused to beg John Price's pardon, whereupon he was committed to the house of correction, to be there kept to hard labour for one calendar month. The year for which the pauper had been so hired expired two days before the expiration of the calendar month for which he was committed. The pauper remained in the jail during the whole of that month, and left the jail at the expiration thereof. During the time of his imprisonment the pauper's clothes remained at the house of John Price, in Tibberton; and when the pauper left

the jail, he went to John Price's house, and took away his clothes, and received from John Price all his wages, with the exception of 7s., which John Price deducted for the time the pauper had been in jail, and he then quitted John Price's house.

Oldnall Russell, and *Ryan*, in support of the order of sessions. In order to gain a settlement by hiring and service, there must be service for a year, either actual or implied. In this case there was no such actual service, for the pauper was in prison during the last month *of the year; neither can service during that period be implied. The case of *Rex v. Barton-upon-Irwell*, [*741 2 M. & S. 329, will perhaps be relied on by the other side, but it is very distinguishable from this. There the pauper in the whole served nineteen months, and the only question was, whether the imprisonment operated as a dissolution of the yearly hiring. Here it is not necessary to contend for a dissolution, it is sufficient to say, that the pauper did not serve under the yearly hiring, during the time of his imprisonment, *Rex v. North Cray*, Cald. 496, 2 Bott. 322, S. C.; *Rex v. Westmeon*, Cald. 129, 2 Bott. 320, S. C. Had the pauper run away a month before the end of the year, then surely there would not have been a sufficient service. [BAYLEY, J. Suppose that to have happened in the middle of the year, and that the servant had afterwards returned to his master.] If the latter received him it would amount to a dispensation. Under the 20 G. 2, c. 19, s. 2, (a) the master had no election as to what the magistrate should do upon his complaint of the servant's misconduct. It will be urged that the magistrate having by that act power to discharge the servant expressly, and not having done so, the relation of master and servant still continued. The service, however, did not continue; if it were held that *it did, this absurdity [*742 would follow, that although the servant was committed to prison, as a punishment for not duly serving, yet he was to be considered as serving during the time of his imprisonment. Here too the servant was committed to be kept to hard labour, and therefore the master could not require work from him.

Nolan (and *Shutt* was with him) contra. It may be admitted that to gain a settlement there must be an abiding in the service for a year, but that may be either by actual or constructive service. In *Rex v. Westmeon*, the servant was taken from the master's service without his consent or privity; here he was sent to prison with the privity and assent of the master, and the justice did not think proper to dissolve the contract. (He was then stopped by the court.)

ABBOTT, C. J. I am of opinion that there was a complete service for a year, notwithstanding the commitment, under the 20 G. 2, c. 19; but I wish to be understood as speaking of a commitment under that statute only. The second section is for the punishment of servants in the character of servants. It gives the magistrate power to put an end to the service, if he thinks fit: when that power is exercised it puts an end to all question of settlement. But the statute gives another power also, viz., that of imprisoning the offending party for any period not exceeding one month. If an imprisonment for a month, under that provision, defeats the settlement, imprisonment for a week, or even for a day, must have the same effect. There is nothing to show that the legislature contemplated or intended to produce such an effect. I therefore think, that a servant committed under the *statute in question must be considered as abiding in the master's service, within the meaning of the 8 & 9 W. 3, [*743 c. 30. It follows, that in this case the pauper gained a settlement in Tibberton, the order of sessions must therefore be quashed.

(a) By this section, it was enacted "That it shall be lawful for any justice, upon application or complaint made upon oath by any master, &c., against any servant, labourer, &c., touching or concerning any misdemeanor, miscarriage, or ill-behaviour in such his or her service or employment, to hear, examine, and determine the same, and to punish the offender by commitment to the house of correction, there to remain and be corrected, and held to hard labour for a reasonable time, not exceeding one calendar month, or otherwise by abating some part of his or her wages, or by discharging such servant from his or her service or employment."

BATLEY, J. I am of opinion that this case falls within the distinction taken by *LE BLANC, J.*, in *Rex v. Barton-upon-Irwell*. He there says, "It was under the authority of the contract that his master acted when he punished him for misconduct, therefore it was not a dissolution." So here the pauper was imprisoned at the instance of the master. The latter might have pressed for a dissolution of the contract, but instead of that, there was an understanding between him and the justice, that the pauper should either beg his master's pardon or remain the rest of the year in prison. It has been conceded that that does not operate as a dissolution, and I think it may be put either as a constructive service or a dispensation. In the case cited it was held, that the servant gained a settlement, and I cannot see why the imprisonment should have a different effect at the end from that which it had in the middle of the year. It has been urged in argument, that the master, by taking the servant back, is to be considered as dispensing with his service during his absence. But the contract not being dissolved, if the servant were released from prison before the end of the year, the master would be under the necessity of receiving him. For these reasons I am of opinion, that the pauper gained a settlement in Tibberton, and that the order of sessions must be quashed.

*HOLROYD, J. There is a great difference where the servant's absence⁷⁴⁴ from actual service arises, as in this case, at the instance of the master, and where it is occasioned by any criminal act done by the servant, and independently of the master. The ground of the commitment of the servant was absence from his duty for a day: possibly the master might have had a right to discharge him for that neglect, but he neither did that of his own authority, nor applied to the justice to do it, so that the relation of master and servant continued. I think that the service also continued, just the same as if the occurrence had happened in the middle of the year. The servant being imprisoned and punished as a servant, might have insisted upon going back to his master, or the master might have compelled him to return, as soon as he was discharged out of custody.

LITTLEDALE, J. In this case neither the master nor the justice having discharged the servant, the relation of master and servant continued. Then the servant, when in prison, did not absent himself voluntarily from the master's service. The imprisonment was at the instance of the master, the servant might still be ready and willing to work for him. I am therefore of opinion that it must be considered as a constructive service, and sufficient to gain a settlement in Tibberton. The order of removal to Hallow was therefore bad.

Order of sessions quashed.

*BRAMWELL and Another, Assignees of the Estate and Effects of
W. NOAKES, a Bankrupt, v. M. P. LUCAS, W. THOMSON,
and T. GROVES.

A communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in a cause.

TROVER by the plaintiffs as assignees, to recover the value of a lease, and divers goods and chattels amounting to 280*l.* 19*s.* 10*d.*, belonging to them as assignees of William Noakes, and by the defendants converted to their own use. At the trial before ABBOTT, C. J., at the Middlesex sittings after last Hilary term, a verdict was found for the plaintiffs subject to the following case. On the 7th day of November last, at seven o'clock in the evening, the lease and goods were seized by the defendants, M. P. Lucas and W. Thompson, who were sheriffs of London and also sheriff of Middlesex, under two writs of *elegit* issued on that day, founded on a judgment obtained by the other defendant Groves against the said W. Noakes, for 4,000*l.* damages and 84*s.* costs;

and the only question in the cause was, whether W. Noakes had committed an act of bankruptcy prior to such seizure under the said writs. In order to prove such prior act of bankruptcy, Scott was called as a witness on the part of the plaintiffs, and he stated that he acted as solicitor to the bankrupt, and in that character, and upon his (Scott's) suggestion to the bankrupt, called a meeting of his creditors, to be held at the George and Vulture tavern in Cornhill, at twelve o'clock at noon on the 7th day of November last; and that, in the morning of that day, W. Noakes came to his (Scott's) office, and inquired of the witness whether he could safely attend such meeting of his creditors without being arrested for debt; and that he (Scott) advised him to remain at his office, until it was ascertained whether the creditors would engage to give him a safe conduct; and that W. Noakes accordingly did remain at his house or office for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the witness had attended at and returned from the said meeting of W. Noakes' creditors. It was objected on the part of the defendants, that the evidence of Scott was not admissible under the circumstances to prove what passed at his office as above mentioned, but the lord chief justice received the evidence, subject to the opinion of the court as to its admissibility. [*746]

This case was argued on a former day in this term, by
F. Pollock for the plaintiffs. The evidence of the conversation which passed between the bankrupt and Scott was admissible in this case. The argument on the other side must be, that the communication was confidential to Scott, he being an attorney, and therefore that he was bound not to disclose it. But there are two cases where the privilege does not apply. Where the communication is foreign to the business of an attorney; and where an attorney is called to speak to a mere matter of fact. The privilege is that of the client, not of the attorney, and the ground upon which the privilege rests is, that it may be necessary for the protection of a man's rights that he should make confidential communications to his attorney. That being the reason of the privilege, all communications collateral to the business of an attorney are of course excluded. *The interference of Scott in this matter, and his conversation with the bankrupt, certainly did not arise out of the professional character or employment of the former, and therefore no privilege could be claimed as to that conversation. *Cobden v. Kendrick*, 4 T. R. 431; *Wilson v. Rastall*, 4 T. R. 753. Secondly, an attorney may be called to prove an act done, *Rex v. Watkinson*, 2 Str. 1122; *Doe d. Jupp v. Andrews*, 2 Cowp. 845; *Spenceley v. Schullenburgh*, 7 East, 357. Here, the intention with which the bankrupt absented himself from the meeting was part of the *res gestæ*, and therefore might be proved by Scott. [*747]

J. Williams, contra. The cases of *Cobden v. Kendrick* and *Wilson v. Rastall* may be conceded, for there the communication to the party called as a witness was not made to him in his character of attorney. So also *Rex v. Watkinson*; *Doe v. Andrews*, and *Spenceley v. Schullenburgh*, may be admitted to be law, but there the party was called merely to speak to a matter of fact within his own knowledge, which knowledge was not derived from any communication or connection with his client. *Robson v. Kemp*, 5 Esp. 52, is not distinguishable from the present case. It cannot be said that the communication, in order to be privileged, must be made in the course of a suit, for, in *Gainsford v. Grammar*, 2 Camp. 9, Lord ELLENBOROUGH held the contrary, and there *Cobden v. Kendrick* and *Wilson v. Rastall* were pressed upon him as authorities against that opinion: and *Gainsford v. Grammar* is supported by *Cremack v. Heathcote*, 2 B. & B. 4. In *Brard v. Ackerman*, 5 Esp. 110, the attorney was questioned as to a fact, and excused from answering as his knowledge was acquired in the character of an attorney. There is certainly a case of *Wadsworth v. Hamshaw*, cited at the end of the [*748]

report of *Cromack v. Heathcote*, in which it appears to have been held, that only those communications are privileged which relate to a suit actually existing, or about to be commenced; but the current of authorities is the other way. Then can it be said that this conversation was not held with Scott as an attorney? He was asked a question about the bankrupt's liability to arrest. Now that was a question which could only be answered by a professional man, it must therefore have been put to him as an attorney, and for the purpose of having his advice.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the court. The question in this case was, whether the testimony of an attorney was, under the circumstances, admissible in evidence against his client, or whether, upon the principle of a client's privilege, it ought to have been excluded. The action was brought by the assignees of Noakes, a bankrupt, and Scott, his attorney, was called by the plaintiffs, to prove the act of bankruptcy. He gave in evidence, that upon his (Scott's) suggestion a meeting of Noakes' creditors was called; that the meeting was to be held on the 7th November, at twelve at noon; that Noakes called on him that morning, and asked if he could safely attend such meeting without being arrested; that Scott advised him to remain at his office till it was ascertained whether the creditors would engage to give him safe conduct, and that he accordingly *remained there two hours, to avoid being
*749] arrested, till Scott returned from the meeting, and the question is, whether the whole or any part of this evidence ought to have been excluded; that Scott was competent to prove that the meeting was called; that it was called upon his suggestion, and that Noakes' came to and remained at his office is beyond all doubt; but the point disputed was, whether Noakes' question to Scott and Scott's answer to him was not within the privilege, and we think it was not. Whether the privilege extends to all confidential communications between attorney and client or not, there is no doubt that it is confined to communications, and to communications to the attorney in his character of attorney. A question for *legal advice* may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information *as to matter of fact*, as to a communication the attorney has made to others, where the communication might have been made by any other person as well as an attorney, and where the character or office of attorney has not been called into action, has never been held within the protection, and is not within the principle upon which the privilege is founded. Was this, then, a question for legal advice, put to Mr. Scott in his character of attorney, or was it not a question for information *as to matter of fact*, in which the professional character of Mr. Scott as attorney was not considered? It can hardly be supposed, that a man could ask, *as matter of law*, whether he would be free from arrest whilst attending a voluntary meeting of creditors; but he might well ask, *as matter of fact*, from the person at whose suggestion the creditors had been convened, whether any arrangement had been made with the creditors to prevent an
*750] arrest, *and Mr. Scott's answer implies, that the question was put with the latter view. He gives no legal advice, his answer implies that no arrangement had been made, but that he would see at the meeting whether any could be effected; and he recommends Mr. Noakes, not as a *legal* adviser, but as any agent or any friend might have recommended, to stay where he was till that matter of fact could be ascertained. Upon the ground, therefore, that no part of this case comes within the description of confidential communication between attorney and client, we are of opinion that the whole of the evidence was properly received, and that the *postea* ought to be delivered to the plaintiffs.

Judgment for the plaintiffs.

**The KING v. The Inhabitants of ST. MARY, in the Borough of
KIDWELLY.**

The father of a pauper aged fourteen years, agreed by parol to give a shoemaker a guinea for teaching his trade to the pauper for twelve months. The son served the twelve months under that agreement. At the end of that period, the father agreed that his son should work for the shoemaker for twelve months, making shoes at 3d. per pair the first six months, and 4d. per pair the last six months; under this latter agreement the pauper served six months *only*: *Held*, that this latter service could not be connected with the service of the former year so as to give a settlement, inasmuch as the first agreement created the relation of teacher and scholar, and not that of master and servant, and the whole year's service, required to confer a settlement, must be under a contract or contracts creating the relation of master and servant.

UPON an appeal against an order of two justices for the removal of William Williams, his wife and children, from the parish of St. Mary, Kidwelly, in the county of Carmarthen, to the parish of Llandeullog, in the same county, the sessions quashed the order, subject to the opinion of this court, on the following case:

On the trial of the appeal the appellants admitted that the legal settlement of the pauper, William Williams, had been in the parish of Llandeullog, but *contended, that he had gained a subsequent settlement by hiring and [751] service. The appellants proved, that when Williams was about fourteen years of age he lived with his father, in the parish of Saint Ishmael, in the county of Carmarthen, and being desirous of being apprenticed to a shoemaker, his father agreed with one John Thomas, a shoemaker in the parish of Saint Ishmael, to give him a guinea for teaching his son, the pauper, the trade of a shoemaker for twelve months, the father finding the pauper lodging, and every thing else during that time. The pauper served the whole twelve months under that agreement. There was no indenture or writing, but the pauper considered it as an apprenticeship, and his father and master treated and spoke to him as an apprentice during such twelve months; and his father and master told him there was a guinea paid for teaching him the trade. The pauper's father, at the end of the year, came to an agreement with Thomas, that the pauper should work with Thomas for twelve months, making shoes at 3d. per pair the first half year, and at 4d. per pair the remaining half year. The pauper worked with him about *six months* under that agreement, and then went away and worked at several places, until his marriage, which happened 1785. He soon afterwards removed to the parish of St. Mary.

Nolan and Davies, in support of the order of sessions, contended, that the pauper had gained a settlement by hiring and service in the parish of Saint Ishmael, for although the service under the second agreement was but for six months, yet that service might be connected with the previous service under the first agreement. That was void as a contract of apprenticeship; the service under it, *therefore, was a service under no contract at all, and might be [752] coupled with the service under the second contract, *Rex v. Dawlish*, 1 B. & A. 280.

Oldnall, Russell, contra, was stopped by the court.

BAYLEY, J. The question in this case is, whether a settlement has been gained by hiring and service. In this case there was a contract of hiring, but under that contract there was only a service for six months. If, however, that service can be connected with the service of the preceding year, then a settlement was gained in the parish of Saint Ishmael. Now, in order to gain a settlement by hiring and service, the service must be under a contract, creating the relation of master and servant. Here, the first contract created only the relation of teacher and scholar, and the service under it not being under a contract of hiring, cannot be coupled with the subsequent service. *Rex v. Bilborough*, 1 B. & A. 115, is an authority in point. There the master agreed, by parol contract, to teach the pauper to make stockings during the year, for which he

was to receive two guineas, and the pauper was to have his earnings, paying his master for the use of the frame, &c. ; and the pauper continued in the service a year and a half; and it was contended, that the pauper gained a settlement by hiring and service; but the court said that the pauper never contracted to serve the master, and that the only agreement was, that the master should teach the pauper for a year. In the present case there was no obligation on the part of the pauper to serve the master, nor could he have been *punished for refusing to do so. The relation existing between them was that of teacher and scholar. Now, although it be clear, that services under different hirings may be connected, so as to complete the year's service, yet the whole of the several services constituting the year's service must be under a contract or contracts, creating an obligation to serve. In this case, there was not any obligation on the pauper to serve under the first agreement. That service, therefore, not being a service under a contract creating the relation of master and servant, cannot be connected with the subsequent service; and there being only a service of six months under a contract of hiring, no settlement was gained.

LITTLEDALE, J. In order to gain a settlement by hiring and service, the service must be for a year, under a contract or contracts, creating the relation of master and servant. The pauper served only six months under such a contract. The contract under which he served during the former year, created the relation of master and scholar, and not that of master and servant. The service under that contract, therefore, cannot be connected with the service under the subsequent contract, for the effect of that would be, to enable the pauper to gain a settlement by a service, partly under a contract of hiring, and partly under a contract of a different description; whereas the entire year's service ought to be under a contract of hiring.

Order of sessions quashed.(a)

(a) This case was argued later in the day than that of *Rex v. Lydd*, and when Abbott, C. J., was sitting at nisi prius at Guildhall. Holroyd, J., had gone to chambers before the judgment was pronounced.

*754]

*The KING v. The Inhabitants of LYDD.

A pauper had been hired for three years at 20*l.* per annum as a looker. The duty of a looker is to superintend the flocks and fences of his employer. When he was hired, his master told him that he should not have full employment for him, but that he would employ him as much as he could. He was not to do any work for his master, other than that belonging to the office of looker, without receiving extra wages. During the first year and three quarters he worked for his master only, but was always paid extra for any work not belonging to his office of looker: *Held*, that there was not any hiring for a year, and that the pauper did not gain a settlement by service under such a hiring.

Upon appeal against an order of two justices for the removal of G. Goldsmith, his wife and children, from the parish of Lydd, in the county of Kent, to the parish of Thurnham in the same county; the sessions quashed the order, subject to the opinion of this court on the following case:

In the year 1810, the pauper gained a settlement by hiring and service in the parish of Thurnham. On the 26th or 27th of August, 1819, the pauper, being then unmarried and having no child, was hired to Mr. Fisher, in the parish of Midley, for three years at 20*l.* per annum, as looker and to spud thistles. (The duty of a looker is to superintend the flocks and fences upon the lands of his employer, and he frequently has several masters, and works for any persons who may employ him according as his time allows.) The pauper went into the service of Mr. Fisher on the 26th of October, and was married on that day. He served Mr. Fisher for three years. He did not work for any person but Mr. Fisher for the first year and three quarters of his service, but at the expiration of that time he hired himself as looker to a Mr. Russell. During his service with Fisher, he did other work for him not belonging to his duty as looker, such as

turning mould, lambing and shearing, for which he was always paid upon new and separate bargains on each occasion; and upon other occasions he did day-work as a labourer for Fisher, for which he was also paid by the day. At the time of the *pauper's contract with Fisher, nothing was said about his being [*755 at liberty to hire himself to, or work for other masters during the three years, but Fisher said he did not think he should have full employment for the pauper; he would employ him as far as he could. Whilst he was working for other people, his wife hoisted a signal by putting a flag out of the window, upon which he considered himself bound to quit his work and attend to his duty as looker to Fisher, for which he was originally hired; and he invariably returned to Fisher when so summoned, and never worked on any lands from whence the flag could not be seen during the whole of the three years. He was not, however, to do any work for Fisher, other than that for which he was originally hired as a looker, without receiving extra wages. His agreement with Russell was by the acre, and he bargained with him for a year at 14*l*. During the whole of the three years he lived on Fisher's land at Midley.

Bolland and Claridge in support of the order of sessions. The master was entitled to demand the service of the pauper so long as the species of service which he had contracted to do required his attention. Here was a contract for three years, and an actual service to Fisher during that time. But it may be said that he was not under Fisher's control during the whole period. It appears, however, by the case, that he never worked for any person but F. during the first year and three quarters. He therefore gained a settlement by that service. And when working for other persons during the latter part of the three years, he invariably returned to his duty as looker whenever his wife hoisted the flag. He was, therefore, under F.'s control during the whole *time. The receipt of extra wages for extra work makes no difference, [*756
Rex v. Horwicks, 10 East, 489.

Berens contra. In order to confer a settlement by hiring and service, the contract must be such as to give the master the absolute control over the servant during the whole period of service. Here, from the very nature of the agreement, the master could never have had such a control, for the pauper was bound to serve so long only as the duties of looker required his attention, and for any other work he was paid extra. *Rex v. Edgmond*, 3 B. & A. 107, is in point, and *Rex v. Polesworth*, ante, 715. If the contract was for the whole year, there could be no necessity for making any new contract for extra work.

ABBOTT, C. J. I am of opinion that there was not in this case any contract of hiring and service for one whole year. Here, the master had not the control over the servant for the entire year, but only for so much of the year as the duties of looker required his attention. At other times he was at liberty to employ himself in any manner he pleased, either in working for other persons or for his master, and when he worked for the latter he always received extra pay.

BAYLEY, J. In order to gain a settlement by hiring and service there must be a contract for one whole year, and a service for the whole year. This is distinguishable from the cases cited, because here, from the very nature of the employment, it was not likely to *fill up the whole time of the pauper. [*757 Scarcely ever more than a few hours each day would be required. It is very like the case of a person employed to attend, as an occasional servant, for the purpose of brushing clothes. The master has no control over the servant as soon as he has performed the required service, and that takes up but a small portion of his time.

Order of sessions quashed.

The KING v. The Inhabitants of MARKET BOSWORTH.

A pauper was hired to serve for part of a year. Three weeks before the expiration of the period of service, the mistress asked the pauper to stay again. The pauper replied that she had no objection if they could agree about wages. They did agree for 3*l.* 10*s.*, and 1*s.* earnest was paid; nothing was then said as to the time for which the pauper was to serve, but a week afterwards, the mistress said to the pauper, "I have hired you, but mentioned no time; remember that you are hired for fifty-one weeks," to which the pauper assented: *Held*, that this was a good hiring for a year.

UPON an appeal against an order of two justices for the removal of Hannah Stain, single woman, from the parish of Fleckney, in the county of Leicester, to the parish of Market Bosworth in the same county; the sessions confirmed the order subject to the opinion of this court on the following case:

The pauper was hired by, and lived with, Mrs. W., in the parish of Market Bosworth, from Shrove Tuesday, 1821, until Old Michaelmas-day following. Three weeks before the last-mentioned day, Mrs. W. asked the pauper "to stay again," to which she replied, that she had no objection if they could agree about wages; they agreed for 3*l.* 10*s.*, and one shilling earnest was paid. At the hiring, nothing was said as to the time for which the pauper was to serve. There was no interval between the first and second service. A fortnight before

*758] Old Michaelmas her mistress said to her, "Hannah, I have *hired you," but mentioned no time, remember you are hired for fifty-one weeks."

To this the pauper said, "Very well." The pauper lived with Mrs. W. until Old Michaelmas-day, 1822. She asked to have her week just before Christmas. Mrs. W. said, "You shall have three or four days now, I cannot spare you the whole week." She staid away three successive days and nights then, and had the other four days at different times during the year, returning on each of them to sleep at her mistress's, and her mistress gave her two or three holidays besides. She never was absent without her mistress's permission, and always returned into the service, and at the end of the year received her wages.

The case was argued by *Reader, Hilliard, and Humphrey*, in support of the order of sessions, and *Marriott and Fynes Clinton*, contra.

BAYLEY, J.(a) The question in this case ought to have been decided by the court of quarter sessions, but inasmuch as great expense has been incurred, we will pronounce our judgment upon the facts stated in the case. And I am of opinion that a settlement was gained in Market Bosworth. It appears, that three weeks before Old Michaelmas, the mistress asked the pauper to stay again, to which she replied, that she had no objection if they could agree about wages; they did agree for 3*l.* 10*s.*, and one shilling earnest was paid. Now it is quite clear that that constituted a general hiring for a year, and the question is, whether the subsequent conversation between the mistress and the servant amounted to an alteration of the original bargain, so as to convert that

*759] "which had been a hiring for a year into a hiring for fifty-one weeks only, or whether it was a dispensation by the mistress with one week's service. Now it is laid down in Mr. Nolan's Treatise on the Poor Laws, vol. i. 297, that where the absence of the servant takes place on the master's account and at his request, the courts have been inclined to infer a dispensation, inasmuch as the absence originates with him in whom the power of dispensation is vested, and is only acquiesced in by the servant. Now, apply that rule to the present case. There having been a general hiring for a year, the mistress afterwards states to the servant that she had hired her, but that she had mentioned no time, and desires her to remember that she was hired for fifty-one weeks. The servant made no overture to the mistress for a change of the original agreement. According to the above rule, therefore, this ought to be construed to be a dispensation: the mistress acknowledges that there had been a hiring, and if she intended to explain the original agreement, her explanation of

(a) Abbott, C. J., was sitting at nisi prius at Guildhall.

it was false; for in the first instance, there is a hiring for a year at an entire sum of 3*l.* 10*s.*, and there is no stipulation afterwards that the pauper was to be paid wages for fifty-one weeks, at the rate of 3*l.* 10*s.* for the whole year. I think, therefore, that there was no alteration of the original bargain, but that there was a dispensation with the service of the pauper for one week, and I think that the sessions were warranted in considering this either a case of dispensation or of fraud. I cannot distinguish this case from that of *The King v. Sulgrave*, 2 T. R. 376. There the pauper was hired in February to serve till Old Michaelmas. On the Friday before Old Michaelmas, his master asked him if he would stay again, the pauper said he would if they could agree about wages, and asked five guineas, which the master thought too much. Afterwards the master said he would give him five guineas, and he gave him one shilling in earnest; but while he was putting his hand in his pocket for the shilling, he said you shall go away a fortnight before Michaelmas because of your settlement, and that he would give him that time to get what he could, to which the servant assented. It was held that this was a mere dispensation with the service for that time, and not such an exception out of the original contract as would make the hiring insufficient for the purpose of gaining a settlement; and ASHURST, J., in delivering his judgment, said, "that the contract was complete before any thing was said relative to the fortnight's absence; and that this was a dispensation with the service, and not an exception out of the original contract. An exception is a stipulation on the part of the person for whose benefit it is introduced, but here it was not made at the request of the servant, but on the offer of the master." Upon the authority of that case, as well as upon general principles, I am of opinion that the sessions were warranted upon these facts, in coming to the conclusion that there was a hiring for a year; and that there was no exception in the contract of hiring, but a mere dispensation by the mistress with one week's service: and I think, therefore, that the order of sessions ought to be confirmed.

Order of sessions confirmed.

*THOMAS v. PEARCE.

[*761

Where a defendant on being served with a copy of a writ, demands to see the original, and it is not shown to him, the service is irregular, and will be set aside with costs.

A RULE had been obtained by *Reader* to set aside the service of a copy of the bill of Middlesex, in this case, for irregularity. It appeared, that when the plaintiff served the defendant with the copy, he asked to see the original, when the plaintiff replied, that he had not got it with him, but that his attorney had it.

Archbold showed cause, and contended, that the plaintiff was not bound to show the original, when he served the copy. The statutes 12 G. 1, c. 29, and 51 G. 3, c. 124, s. 1, direct that, in certain cases, a copy shall be served, but do not require that the original process should at the same time be shown. In *Worley v. Glover*, 2 Str. 677, it was said, that the statute requiring service of a copy was the same as if it had said "deliver a copy;" and *Boswell v. Roberts*, Barnes, 422, was a similar decision.

Per Curiam. In *Edgar v. Farmer*, Ca. temp. Hardw. 138, Lord HARDWICK expressly states, that the service of the process was bad, because the defendant was not allowed to see the original, although he demanded it when served with the copy. That is perfectly consistent with *Worley v. Glover* and *Boswell v. Roberts*, for it does not appear, that in either of those cases the defendant desired to see the original; and unless he expresses such a desire, the other party is not bound to show it. This point was very lately before the court of common pleas, in the case of *Westley v. Jones*, 5 B. M. 162, when they acted upon the opinion expressed by Lord HARDWICK in *Edgar v. Farmer*, and set aside the service of the copy of process.

the original not having been shown, although demanded. The act of parliament does not say that the plaintiff "shall deliver a copy," but that he shall "serve the defendant personally with a copy." Where that is required the party has a right, if he wishes it, to see the original, in order that he may have reasonable proof that he is served with a correct copy of the process; the service in this case was, therefore, irregular, and must be set aside with costs.

Rule absolute.

ROBINSON v. VALE.

The plaintiff in an action of trespass, having obtained a verdict, signed final judgment after the defendant had committed an act of bankruptcy, but before the issuing of a commission: *Held*, that the debt was proveable under a commission subsequently issued, and that the defendant, who had been arrested on a ca. sa., was entitled to be discharged on obtaining his certificate.

A RULE having been obtained to discharge the defendant out of custody, on the ground that he had obtained his certificate under a commission of bankruptcy, which issued after the contracting of the debt for which he was arrested. It appeared, that an action of trespass had been brought against him for taking the plaintiff's goods; the plaintiff obtained a verdict, and final judgment in that action was signed on the 29th of January. The defendant committed an act of bankruptcy on the 23d, and a commission was thereupon issued on the 31st of the same month. The defendant *was afterwards arrested, *763] on a ca. sa., and having obtained his certificate, which was allowed on the 8th of April, made this application.

Wilde showed cause, and contended, that the plaintiff's demand was not proveable under the commission, the damages and costs in an action of tort not being "a debt bonâ fide contracted," within the meaning of the 48 G. 3, c. 135, s. 2, which enables creditors to prove such debts, when contracted between the act of bankruptcy and the issuing of the commission.

Per Curiam. The judgment, even in an action of tort, is a debt contracted. The words "bonâ fide" in the statute, appear to be used in opposition to debts contracted by collusion; and it seems to have been the object of the legislature, to prevent all discussion, as to whether a fair debt of any description was contracted before or after the act of bankruptcy. This debt was therefore proveable, and the defendant must be discharged.

Rule absolute.

*764] *The KING v. The Bailiff and Burgesses of ILCHESTER.

The bailiff and burgesses of Ilchester (a corporation by prescription,) had from time immemorial been lords of the manor of Ilchester, and, as such, had during all that time holden a court-leet for the manor, on certain days, in the guildhall of the borough, which was their property. In the 2 Ph. & M., they accepted a charter, which purported to grant to them a court-leet to be holden in the guildhall, "as of ancient time had been used." By an award afterwards made, in pursuance of a private act of parliament, "the manor of Ilchester, with the rights, members, courts, view of frankpledge, &c., royalties and appurtenances, (excepting to the bailiff and burgesses the guildhall, houses, buildings, court, or garden belonging to the same. &c.,)" were conveyed to Lord H.: *Held*, that although the exception retained in the bailiff and burgesses the property in the guildhall, yet the lord of the manor had a right to hold the court-leet there.

MANDAMUS, reciting that the lord of the manor of Ilchester, for the time being, from time immemorial, hath holden, and still of right ought to hold, a court-leet and view of frankpledge, in and for the said manor, yearly, to wit, on, &c., or on such other day and time as to him shall seem meet and necessary; which said court-leet and view of frankpledge from time whereof, &c., of right have been, and still of right ought to be, holden in the guildhall of the borough aforesaid; commanded the bailiff and burgesses to permit Sir W. Talmaish, commonly called Lord Huntingtower, lord of the said manor, to hold the

court-leet in the guildhall, as of right he ought to do. The return admitted that the manor of Ilchester was an ancient manor, and that Lord H. was lord of the manor, by virtue of an award thereafter set forth; and that the lord, by his steward, hath from time whereof, &c., holden, and still of right ought to hold, a court-leet, &c., in and for the manor, to wit, &c.; "but that such court-leet of right ought not to be holden in the guildhall of the borough aforesaid." And further, that the borough of Ilchester is an ancient borough, and that the inhabitants thereof, from time whereof, &c., have been a body politic and corporate, by the name of the bailiff and burgesses of the borough of Ilchester; and that the inhabitants of the borough were, by [*765 letters patent, granted by Philip and Mary, in the fifth and sixth years of their reign, incorporated by the name of bailiff and burgesses of the borough of Ilchester; and that the bailiff and burgesses have, from time whereof, &c., been seised and possessed of the guildhall, with its appurtenances, and have been used and accustomed thence hitherto to hold all corporate assemblies there, and to use the same for all corporate purposes; and that until the making of the said award the bailiff and burgesses had been, and were, lords of the manor, and had been used and accustomed to hold courts-leet in and for the manor, within the guildhall, and to have the exclusive use and enjoyment thereof. And that Ph. & M. did by their charter grant unto the said bailiff and burgesses to have within the said borough, for ever thereafter, view of frankpledge, of all the burgesses, inhabitants, and residents, twice by the year, in the guildhall of the borough aforesaid, to be holden at such days and times as to them should seem fit and necessary, as of ancient time had been used. The return then set out a private act of parliament, and an award made in execution of it, whereby the arbitrator awarded to Lord H. "all that the manor of Ilchester, with the rights, members, courts, view of frankpledge, profits of tolls of all markets and fairs held in the borough of Ilchester, royalties and appurtenances to the same belonging, (excepting to the bailiff and burgesses, the guildhall, houses, buildings, court, or garden, belonging to the same, and the ground in front thereof inclosed with iron chains, &c." The return then stated, that there were several [*766 houses in the manor the property of Lord H., where the court-leet might be conveniently holden; wherefore the said bailiff and burgesses have not permitted Lord H. to hold the said court in the guildhall.

D. F. Jones objected to the return, that it did not give any sufficient answer to the lord's claim. The question here is, not whether the lord can hold the court-leet where he pleases within the manor, and compel the residents to attend, but whether the place where he now desires to hold it, is not the proper place. It is true, that in *Rex v. The Mayor of Wigan*, 1 Wils. 76, a mandamus to compel the mayor to let the lord hold a court-leet in the guildhall was refused. Two of the three judges present seem to have proceeded on the ground, that there was no precedent for such a writ, and that the lord might hold the leet where he pleased within the manor. The other judge (CHAPPLE, J.) observed, "If the in-burgesses have attended this leet in the town-hall, time out of mind, as is alleged, that custom is a right." Here it is admitted by the return, that the court has been immemorially holden in the guildhall, and the charter of Ph. & M. directs, that it shall be there holden, "as of ancient time hath been used." And in *Rex v. The Corporation of Grantham*, 2 W. Bl. 716, such a mandamus was granted. The exception in the award set out in the return does not affect the question. In the cases cited it was never suggested, that the lord could not have a right to hold his leet in the guildhall, because the property was in the corporation; and it is quite plain, that "the exception in the award was merely intended to leave the property in the guildhall in the [*767 bailiff and burgesses, but not to disturb or destroy any right which the lord might have, to use it occasionally for the purpose of holding his courts.

Adam, contra. The lord of the manor of Ilchester has not any right to hold

his court-leet in the guildhall of the borough. There is nothing on the face of the return to show a custom to hold it there; nor is there any thing in the charter of Ph. & M. which makes it incumbent on the lord to hold his court there. The return states, that although the lord hath immemorially held a court-leet, yet that such court-leet of right ought not to be holden in the guildhall. [BAYLEY, J. But it does not deny, that it has of right been holden there from time immemorial.] The bailiff and burgesses are alleged to have been lords of the manor from time whereof, &c., and the unity of possession of the manor and guildhall, gets rid of the presumption that the lord has, by custom, a right to hold his court there. Nor is the case altered by the charter of Ph. & M. It certainly, in words, grants a court-leet to be holden in the guildhall, but there is nothing in the charter to make the place of the essence of the court. Besides, as the charter does not confer any new privileges, it is to be considered rather as a charter of confirmation than of original grant; it cannot therefore be supposed, that the crown intended to impose the necessity of holding the court-leet in any other way than that which would have sufficed before. Of the cases which have been cited, *Rex v. Mayor of Wigan* is an authority in favour of this return, and *Rex v. Grantham* is not entitled to much weight, as it appears to *have been but little considered, and the attention of the court was not directed to *Rex v. Wigan*. Lastly, the exception in the award was of the guildhall entirely; and therefore the lord can have no right to go there at all. There was no saving of any right which he would have had but for the exception.

ABBOTT, C. J. We are not called upon in this case to decide whether or not the lord of the manor of Ilchester could hold his court-leet in any other place than the guildhall, but whether he has a right to hold it in that place. Upon the return, it appears that certain facts are admitted, viz., that from time immemorial the bailiff and burgesses of Ilchester have been lords of the manor of Ilchester, and have, during all that time, held a court-leet in the guildhall; and it is further admitted, that a charter of Ph. & M., granted to the bailiff and burgesses, to have within the borough a court-leet in the guildhall of the borough, to be holden as of ancient time had been used. Up to the execution of the award, which also is set out in the return, the court-leet appears to have been always holden in the guildhall. That award being made in pursuance of a private act of parliament, is to be considered as in the nature of a conveyance. Now what does it give to the present applicant? "All that the manor of Ilchester, with the rights, members, courts, view of frankpledge, profits of tolls of all markets and fairs held within the borough of Ilchester, royalties and appurtenances to the same belonging." Had the award or conveyance stopped there, the right to hold the court-leet in the guildhall would unquestionably have passed. Then do the words of the exception narrow that grant? "Excepting to the bailiff and burgesses, and their successors, the guildhall, houses, buildings, court or garden belonging to the same, and the ground in front thereof, now inclosed with iron chains; and also except the allotments hereinbefore made to them, and also divers quit-rents, as in the award in that behalf mentioned." The things excepted are all matters of property, and it is not inconsistent with the terms of the exception, that the use of the guildhall for the purpose of holding the court-leet should pass by the granting part of the award. For these reasons, I am of opinion, that the award conveyed to Lord H. not only a right to hold a court-leet, but a right to hold it in the guildhall of the borough of Ilchester. A peremptory mandamus must therefore be awarded.

BAYLEY, J. I am of opinion that the return is insufficient, and ought to be quashed. The bailiff and burgesses might have given a very short answer to the most material allegation in the writ, viz., that the court-leet has not, from time immemorial, of right been holden in the guildhall. The return, however, does not apply to the time past, but merely to the present. I think, that by

omitting to deny the whole allegation, the corporation have admitted that which obliges them to allow the lord to use the guildhall for the purpose of holding the court-leet there; for they admit that the leet has been always holden there, and set out a charter of Ph. & M., granting to them a court-leet to be holden in that place, as of ancient time had been used. The lord of the manor then clearly had a privilege to hold the court there, and I am inclined to think that he was under an obligation to do so; but it is not necessary to decide that point. The exception in the award does *not vary the case; for the reservation of the guildhall is subject to all the privileges annexed to the court-leet. [*770]

HOLROYD, J. I think that the right to hold the court-leet in the guildhall passed to Lord H. together with the court. That was a distinct right existing at the time independent of the ownership of the soil; it was a right in which all the residents, as well as the corporation, were interested. The exception retained in the corporation the ownership of the guildhall, but that ownership must exist subject to the privileges vested in other persons. For these reasons, I think that a peremptory mandamus must be awarded.

LITLEDAL, J. The award having granted the leet, with all royalties and appurtenances to the same belonging, it must be taken to have been granted in the same manner in which the corporation before had it, and with all the ancient privileges then annexed to it. Now it is stated to have been immemorially holden in the guildhall, it must therefore be supposed to have been a part of the original grant that it should be holden there, and the award has conveyed it together with that privilege. It may be said, that the word "appurtenances" will not of itself convey a right to hold the court in any particular place. It is true, that by a grant of land with the appurtenances, any thing collateral to the use of the land will not pass; but a place for holding a court is necessary. It is parcel of the court. And if the right to hold it in a particular place has been attached to it from time immemorial, it will pass by a grant of the court with the appurtenances. The exception *relied on does not affect the question. The guildhall appears to have been parcel of the demesnes of the manor, and unless excepted, would have passed to Lord H. together with the manor. That appears to have been the reason for introducing the exception; but even if it were not so, the court-leet having been granted with all privileges, the exception could not afterwards take them away. [*771]

Peremptory mandamus awarded.

The KING v. The Justices of the Peace for the City and County of the City of YORK.

By 55 G. 3, c. 51, an appeal is given against a county rate made in fixed proportions invariably adopted for a series of years.

A RULE had been obtained calling upon the defendants to show cause why a writ of mandamus should not issue, commanding them to cause continuances to their next general quarter sessions of the peace, to be holden in and for the said city and county, to be entered, upon the appeal of the overseers of the poor of the parish of St. Crux in the said city, against a rate or assessment made by virtue of an order of the court of general quarter sessions of the peace, held for the said city and county, on Friday, the 17th day of October last, whereby the inhabitants of the parish of St. Crux were assessed in the sum of 32l. 14s. 9d., as their proportion of the sum by the court directed to be estreated on the inhabitants of the said city and county, and at such next general quarter sessions of the peace to hear and determine the merits of the said appeal. It appeared that a rate had been made, and imposed upon the respective parties within the city and county *in such fixed proportions as had been for a long series of years invariably adopted. Against this rate the parish of St. Crux [*772]

had appealed, on the ground of being overrated, but the sessions refused to entertain the appeal, conceiving that they were not authorized by any existing law to vary the fixed proportions of the county rates from the form in which they had for many years existed.

Tindal showed cause. The sessions were justified in refusing to entertain this appeal. By statute 12 G. 2, c. 29, s. 1, the county rates were to be assessed in such proportions as any of the rates by the former acts had been usually assessed. Under that statute, therefore, the justices had no authority, notwithstanding any change of circumstances, to vary the proportions according to which parishes were then rated. Nor did any appeal lie against a rate founded upon such fixed proportions; for although an appeal is in some instances given by the twelfth section of that act, yet the case of *Rex v. St. Paul's Covent-Garden*, Cald. Ca. 158, expressly determined that it did not lie in a case like the present. The question then is, whether the statute 55 G. 3, c. 51, varies the matter. By the first section of that act, justices in general, or quarter sessions, are empowered to make a *fair and equal county* rate whenever circumstances shall appear to require it; and by the fourteenth section of the same act, an appeal is given against any rate made in pursuance of the first section. But the justices in the present instance have not as yet proceeded to avail themselves of the authority given by that statute, but still adhere to the scale *773] of the fixed proportions. It follows, consequently, that the rate in question is unaffected by any of the clauses in that act. If that be so, the appeal can only lie by virtue of the 12 G. 2, c. 29, but that, the case cited expressly negatives. The inconvenience of a contrary construction would be, that the justices might be compelled at any time, and with whatever inconvenience, to make a new county rate under the 55 G. 3, c. 51, although by the first section of that act they are expressly invested with a discretionary power. No injustice can arise from holding that an appeal is not given, because the party aggrieved may still apply for a mandamus to the justices to make a new ad valorem county rate under the last-named statute, which, indeed, is the proper sort of relief in a case like the present.

Coltman and *Alexander* contra. It is true, that the case of *Rex v. St. Paul's Covent-Garden* determined that no appeal lay under the 12 G. 2, c. 29, against a rate founded on the fixed proportions then existing; but an appeal lies under the 55 G. 3, c. 51, s. 14. That act was of a remedial nature, as appears from the first section, which recites that the laws then in force were found ineffectual for the correction of the disproportions which then existed, or might from time to time take place in the assessment of county rates, and, therefore, empowers the justices in sessions, "whenever circumstances shall appear to require it," to make a fair and equal county rate. But how can the necessity for a new rate appear to the justices in sessions, except by appeals against the disproportions of those then existing? The fourteenth section gives an appeal, in as full *774] and comprehensive words as can be used against "any rate then existing or thereafter to be made, either in pursuance of that act, or of any act or acts then in force." That clearly comprehends not only the new rates to be made in pursuance of the 55 G. 3, but all such as existed previously; viz., those assessed according to the fixed proportions. Indeed, the proviso at the close of that section seems to contemplate the very case. No such inconvenience as that suggested on the other side can arise, for the utmost extent to which the construction contended for can go, will be to call upon the justices to remedy the disproportion existing in the individual case brought before them; and that they are empowered to do by the proviso in the fourteenth section.

ABBOTT, C. J. We are of opinion, that a power of appealing is given by the fourteenth section of the 55 G. 3, c. 51, in a case like the present; and instead of thinking such a power at variance with the object of that act, we

consider it the most convenient construction that the statute can receive. The rule must therefore be made absolute.

Rule absolute

*The KING v. The Inhabitants of BENNEWORTH. [*775

A pauper was hired for a year, and had by agreement a house and garden, a rood of potatoe land, and the keep of a cow on his master's land. After the pauper had served ten years, his cow failing in milk, the pauper had in lieu of the cow two heifers kept for him, through the kindness of his master, and not in consequence of any bargain. The potatoe land and the keep of two heifers was of the annual value of 10*l.*, but the potatoe land and the keep of the one cow was of less annual value than 10*l.*: Held, that the pauper, by having the potatoe land and the keep of the two heifers, *before* the passing of the stat. 59 G. 3, c. 50, gained a settlement: but, *semble*, that by having the potatoe land and the keep of the two heifers after the passing of the 59 G. 3, c. 50, he would not have gained a settlement.

UPON appeal against an order of two justices, whereby James Fletcher, his wife and family, were removed from the parish of Benneworth, in the parts of Lindsey and county of Lincoln, to the parish of Calcethorpe in the said parts and county; the sessions quashed the order, subject to the opinion of this court on the following case:

In 1803, the pauper, James Fletcher (then a married man) was hired by yearly hiring as a confined labourer in husbandry with Mr. Day of Calcethorpe, farmer. The pauper had, according to agreement, a house and garden, and a rood of potatoe land, and the keep of a cow on his master's land. The cow was instead of so much money for wages. The pauper remained in Mr. Day's service eleven years, during which time, namely, in the year 1813, the pauper's cow failed in milk, on which account, through the kindness of his master, and not in consequence of *any bargain*, the pauper had in the place of the former cow, two heifers kept for him by his master on his master's land for about eleven months. The potatoe land and keep of the two heifers were together of the value of 10*l.* per annum and upwards. But the potatoe land and keep of one cow were below that value. On leaving Mr. Day, the pauper went to live as a confined labourer with Mr. Briggs at Scamblesby, *with whom he remained five years. For the last three years of the pauper's service [*776 with Mr. Briggs, the pauper was relieved in Scamblesby by the parish of Donnington on Baine. At the expiration of the pauper's service with Mr. Briggs, the parish of Donnington on Baine took him and his family to their parish, and put them into a cottage in the parish of Benneworth, an adjoining parish, where they continued to relieve them till some time in the year 1822. The pauper then became chargeable to the parish of Benneworth.

Scarlett, Balguy, and Empson, in support of the order of sessions. There was not in this case any occupation of the land by the pauper as tenant, and that is essential in order to give a settlement. *The King v. Bowness*, 4 M. & S. 210, and *Rex v. St. John Glastonbury*, 1 B. & A. 484. If a man hires another at certain wages, and agrees also to lodge and board him in his house, the servant is not the occupier of any part of the house; and if he agrees to lodge and feed, and keep his cows upon his land, the servant is not therefore an occupier of any part of the land. In *Rex v. Bardwell*, 2 B. & C. 161, it was held that the party must reside on some part of the tenement in respect of which the settlement is claimed; and also, that in order to gain a settlement by the right to depasture cows, there must be a stipulation in the contract that the cows should be pasture fed. In this case neither of these circumstances occur. Besides, in order to give a settlement by coming to reside upon a tenement, there must be some contract creating the tenancy. Here, the pauper acquired the right to depasture the two heifers by the kindness of his master. In *Rex v. Fillongley*, 1 T. R. 458, BULLER, J., *considered the pauper as having the tenement under an agreement, which made him tenant at [*777

will. So in *Rex v. Lackenheath*, 1 B. & C. 531, the shoalmaster was considered as tenant at will; and in *Rex v. Croft*, 3 B. & A. 171, the sessions inferred a contract. Now, in this case the pauper acquired the right to feed the two heifers merely by the permission of his master, and not by virtue of any contract. No settlement was therefore gained in the parish of Calcethorpe.

The *Attorney-General, Nolan*, and *Fynes Clinton*, contra. It is clear upon the authorities, that where the run of a cow upon land is of the annual value of 10*l.*, and it is hired by the year, a party thereby gains a settlement. If he pays in labour instead of money, he also gains a settlement. The value of the run of one cow not being of the annual value of 10*l.*, the pauper did not thereby gain any settlement, but the master afterwards gave him the run of two heifers, and that was of the annual value of 10*l.* Suppose, in the first instance, the pauper had had land of the annual value of 9*l.* as an equivalent for his service, he would not have gained any settlement; but if the master afterwards, for his own convenience, gave the pauper other land worth 10*l.* a year, that surely would give a settlement, although he did not occupy that land under a contract. That is the case here, for the two heifers are substituted for one cow. If, therefore, the run of a cow be equivalent to the occupation of a tenement, it is clear that a settlement was gained. Suppose, that instead of service he had paid a money *778] rent for the first tenement, and that *afterwards he was permitted to occupy another tenement of 10*l.* annual value above forty days, and that he paid the rent, he would thereby occupy as tenant. The case of *Rex v. Fillongley*, 1 T. R. 558, shows clearly that no agreement is necessary; for there the pauper was to hold so long as his brother pleased, and was to pay no rent; and in *Rex v. Croft*, 3 B. & A. 174, it was expressly found, that there was not any positive contract. In *Rex v. Bardwell*, 2 B. & C. 160, the judgment did not proceed upon the ground, that a party must reside upon the tenement, in order to satisfy the words of the 13 & 14 Car. 2, c. 12, "coming to settle." *Rex v. Minster* shows that that is not necessary.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the court. This case was argued before us in the course of the present term. We are all strongly impressed with the inconvenience of considering a settlement to be gained under circumstances like the present; and under that impression, we thought it right to consider the subject before we delivered our judgment. We have done so; but we find the law so firmly established, that a perception of the profits of land by the mouths of cattle, is a tenement, within the meaning of the stat. 13 & 14 Car. 2, c. 12, and that an occupation of a tenement of the yearly value of 10*l.* will give a settlement, whether the rent be paid in money or in labour; and even if the occupation be gratuitous and no rent paid; that we do not think ourselves at liberty to unsettle this doctrine; and, consequently, we are of opinion, that a *779] settlement was gained in Calcethorpe, and that the present rule must be made absolute. The inconvenience is retrospective only: the law, so far as it regards a case of this kind being altered by the statute 59 G. 3, c. 50. So that no person need now abstain from such an act as is disclosed in this case, through the fear of bringing a burthen upon his parish.

Order of sessions quashed.

DOE on the Demise of P. THOMAS and FRANCES MARY his Wife v. ACKLAM.

Children born in the United States of America since the recognition of their independence, of parents born there before that time, and continuing to reside there afterwards, are aliens, and cannot inherit lands in this country.

EJECTMENT, to recover certain premises in Kingston-upon-Hull. The demise was on the 1st of November, 1821. At the trial before ABBOTT, C. J., at wa-

York Summer assizes, 1822, the jury found a special verdict, the material parts of which were as follows :

Elizabeth Harrison, A. D. 1813, became seised in her demesne, as of fee, of and in a certain part of the tenements in the declaration mentioned ; and afterwards, and between that year and 1818, E. Harrison became seised in her demesne, as of fee, of and in the residue of the tenements in the declaration mentioned ; and being so seised thereof, she afterwards, on the 26th day of November, 1818, at, &c., died so seised of the said tenements, never having been married, and not having made any last will or testament. At the time of the death of Elizabeth Harrison, Frances Mary, the wife of Philip Thomas, was and still is her next heir, if she the said Frances Mary can by law inherit the said tenements from Elizabeth Harrison ; and Peter Harrison was, during his lifetime, the uncle of E. *Harrison, and also grandfather of the said Frances Mary. P. Harrison, being a natural born subject of this kingdom, went from England to America, and resided for many years, and until the time of his death, in the town of Newhaven, which is now in the state of Connecticut, in North America, but which was at that time in and part of one of the British colonies of North America, where he Peter Harrison held for many years, and at the time of his death, the office of collector of his majesty's customs. Peter Harrison died at Newhaven, in the year 1776, leaving several children him surviving, all of whom, except one daughter, Elizabeth, died during the lifetime of Elizabeth Harrison, without leaving any issue of their bodies them surviving. Elizabeth, the daughter of Peter Harrison, on the 22d day of October, 1781, was married at Newport, in the state of Rhode Island, in North America (which state of Rhode Island was at that time one of the British colonies) to James Ludlow, who was born before the year 1776, in the state of New York, which state was also, at the time of the birth of James Ludlow, one of the British colonies. James Ludlow was originally brought up to the profession of the law. Elizabeth Ludlow died in the United States of America, in the year 1790, leaving at the time of her death one daughter only, namely, Frances Mary, now the wife of the said P. Thomas, her surviving. The said Frances Mary was born at Newport, in America, in the state of Rhode Island, on the 4th day of February, 1784, after the United States of America were recognised as free, sovereign, and independent states, as hereinafter mentioned ; and was married at New York, in the state of New York, one of the United States of America, to *P. Thomas, in the year 1807. The colonies of Connecticut, Rhode Island, and New York, with other colonies in North America, separated themselves from the government and crown of Great Britain, and united themselves together, and on the 4th day of July, 1776, declared themselves free and independent states, by the name and style of the United States of America. On the 3d day of September, 1783, his late majesty acknowledged the United States of America to be free, sovereign, and independent states, and on the same 3d day of September, a definitive treaty of peace was signed, between his said majesty and the United States of America, which treaty is as follows :

Article 1st. His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island, and Providence Plantations ; Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent states ; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the government, proprietary, and territorial rights of the same, and every part thereof.

Article 3d. It is agreed, that the people of the United States shall continue to enjoy, unmolested, the right to take fish of every kind on the grand bank, and on all the other banks of Newfoundland, also in Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at

any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind, on such part of the coast of Newfoundland, as British fishermen shall use, but not dry or cure the same on that *island; and also on the coasts, bays, and creeks of all other of his
 *782] Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose, with the inhabitants, proprietors, or possessors of the ground.

Article 4th. It is agreed that the creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bonâ fide debts heretofore contracted.

Article 5th. It is agreed that congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights, and properties, which have been confiscated, belonging to real British subjects, and also of the estates, rights, and properties of persons resident in districts in the possession of his majesty's arms, and who have not borne arms against the said United States; and that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested, in their endeavours to obtain restitution of such of their estates, rights, and properties, as may have been confiscated; and that congress shall also earnestly recommend to the several states a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, not only with justice and equity,
 *783] but with that spirit of *conciliation which on the return of the blessings of peace should universally prevail; and that congress shall also earnestly recommend to the several states, that the estates, rights, and properties of such last-mentioned persons shall be restored to them, they refunding to any persons who may be now in possession, the bonâ fide price (where any has been given) which such persons may have paid, on purchasing any of the said lands, rights, or properties since the confiscation; and it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment to the prosecution of their just rights.

Article 6th. That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall on that account suffer any future loss or damage either in his person, liberty, or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

Article 7th. There shall be a firm and perpetual peace between his Britannic Majesty and the said states, and between the subjects of the one and the citizens of the other, wherefore all hostilities both by sea and land shall from henceforth cease, prisoners on both sides shall be set at liberty; and his Britannic Majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes, or other property of the American inhabitants, withdraw all his armies, garrisons and fleets from the said United
 *784] States, and from *every port, place, and harbour within the same; leaving in all fortifications the American artillery that may be therein; and shall also order, and cause all archives, records, deeds, and papers, belonging to any of the said states or their citizens, which, in the course of the war, may have fallen into the hands of his officers, to be forthwith restored and delivered to the proper states and persons to whom they belong.

The special verdict then stated, that P. Thomas, and Frances Mary his wife, afterwards, to wit, on the 1st day of November, 1821, demised to the said John Doe, the said tenements with the appurtenances in the said declaration mentioned, to have and to hold for the term of seven years thence next ensuing, and fully to be complete and ended in manner and form as the said John Doe hath in that behalf alleged, by virtue of which demise, he, the said John Doe, entered into the said tenements with the appurtenances, and was possessed thereof until the said William Acklam, afterwards, to wit, on, &c., entered, &c., but whether or not upon the whole matter, &c., in the usual form. The case was, on a former day in this term, argued by

Tindal for the plaintiff. In order to establish the plaintiff's right to recover in this action, it will be necessary to make out three propositions.

1st. That all persons born within the colonies of North America whilst subject to the crown of Great Britain, were natural born subjects to all intents and purposes, and therefore capable to inherit and hold lands in Great Britain.

2d. That the separation of the colonies from the parent state, and the acknowledgment of their *independence, did not in any manner affect the character and capacity of those persons who had been born within the colonies before such separation, as natural born subjects of this kingdom; but that they continued capable to inherit and hold lands in Great Britain as before. [*785]

3d. That by virtue of the 25 Ed. 3, or the 7 Ann. c. 5, explained by 4 G. 2, c. 21, persons born within the United States of America, since their independence has been acknowledged, have the same right to inherit and hold lands as their parents who were born before that time.

The first proposition is so clear, that it is rather to be assumed than to be argued: (this was conceded on the other side.) Then James Ludlow the father, and Elizabeth Harrison the mother of Mrs. Thomas, were natural born subjects of Great Britain, able to purchase, hold, inherit, and transmit lands.

The question upon the second proposition is, simply, whether persons born in the colonies before the separation did, in consequence of the separation, become aliens, and thereby incapable to hold or inherit lands in Great Britain; for alienage is the only incapacity now in question. That they did not become aliens, will be made clear by the arguments arising from the situation of the parties at the time when the independence of the colonies was acknowledged; secondly, by the language of the treaty containing that acknowledgment, subsequent treaties and various acts of parliament sanctioning those treaties; and, lastly, by authorities in the books. And here it may be observed, that the affirmative of alienage lies on the other side. Mr. Ludlow was a natural born subject, it is sufficient for the plaintiff to show that he was *natus ad fidem regis*, it is for the defendant *to make out that he became an alien. The situation of the parties at the end of the war does not furnish any reason [*786] for supposing that this country intended to make all the inhabitants of the United States aliens. It would have destroyed whatever hopes of a reconciliation and reunion were then entertained. Neither could the Americans have any object in becoming aliens. Many of them held lands in this country at the beginning of the war; they were natural born subjects, as such had various privileges, and they revolted because they considered that some of those privileges had been violated. It cannot therefore be supposed that they would be anxious to abandon any of them. There was nothing in the claim of their independence by which they could be rendered aliens, they could not of their own accord, and by their own act throw off their allegiance, "*nemo potest exuere patriam*." Again, many individuals adhered to the parent state; would they become aliens? If so, it must be on the ground that the whole nation, and therefore every individual of the nation became alien. Now, the nation could only be separated from this country by one of three modes, by cession, by conquest, or by voluntary separation acknowledged and sanctioned by the legislature. If the

crown cedes a colony, that will not convert into aliens those who were before natural born subjects, and deprive them of the privileges to which, as such, they were entitled. When Florida was ceded to Spain, did those inhabitants who held lands here become liable to lose them upon office found, or would they be incapable of transmitting them to their heirs? If not, it is clear that cession alone does not make the inhabitants of a colony aliens. Neither can

*787] they be rendered aliens by conquest, for "if they cannot of their own accord put off their allegiance, and if cession by the crown cannot have that effect, it would be singular if they could be rendered aliens by the violent act of a third power. This point will be made more clear by considering hereafter the history of the possessions which the crown of England formerly enjoyed, lying on the continent of Europe. But it will be contended, that where a colony renounces its obedience and separates itself from the parent state, by which its independence it afterwards acknowledged, there the allegiance is at an end. There is not, however, any authority for that position, it must be rested on general principles, and be established by arguments ab inconvenienti; such as the difficulty of owing a double allegiance, and the necessity of contending that all the Americans will be traitors who at any future time may carry arms against this country. As to the first, *Calvin's case*, 7 Co. 1, shows that a double allegiance may be due, a man may be "*ad fidem utriusque regis*," and there are many instances of such an allegiance put in 1 Hale's P. C. 68. As to the other it is sufficient to answer, that it cannot affect the question of law, for if inconveniences necessarily follow out of the law, only the parliament can cure them, dict. per VAUGHAN, C. J., in *Craw v. Ramsay*, Vaugh. 274. The situation of the parties at the time when the separation of the colonies took place, shows then that the Americans were not thereby rendered aliens, and the same appears by the several treaties made with them, and the acts of parliament by which those treaties were recognised. The first article of the original treaty simply declares the United States free and independent.

*788] "It is a relinquishment on the part of the crown of all claim to government, proprietary, or territorial right; but it is confined to soil and territory, which are thereby made foreign. The king, by the treaty, gave something to the states, but did not take any thing from them. The treaty made the nation foreign; that the king had power to do. It did not affect to make the inhabitants personally aliens; that he had no power to effect.

The fifth is the next important article; it contains a direct recognition, by the contracting parties on either side, that the subjects of each state should hold lands in the other. It would have been absurd to restore lands if they could not afterwards be holden. So also it must apply to lands afterwards purchased, and not merely to those which they then held, for a man could not be alien as to part and not as to the residue.

The sixth article provides that no loss or damage should be sustained in person, liberty, or property, by reason of the part taken in the war; but surely to be rendered incapable of holding, inheriting, or transmitting lands would be a damage within the meaning of that article. Eleven years after the making of that treaty, a commercial treaty was made; by the ninth article of which it appears, that Americans then held lands in the British dominions, and might transmit them to their heirs, they were therefore considered as British born subjects for that purpose. This treaty is recognised and confirmed by the 37 G. 3, c. 97, s. 24, which recites and applies to the article in question.

This view of the question is corroborated by several cases, bearing in some degree on the point. The very definition of alien given in Litt. s. 198, "born out of the liegance of our sovereign lord the king," shows that the

*789] place of the birth is not conclusive as to alienage. Lord COKE, in his commentary on that passage, Co. Lit. 129 a, says, "Note here, LITTLETON saith not *hors del realme* but *hors de legiance*, for he may be born out of the realm

of England yet within the allegiance." This shows that Mr. Ludlow and his wife were natural born subjects, and that character, once acquired, is indelible; no authority save an act of parliament is sufficient to destroy it, for that alone can naturalize one born an alien. In *Calvin's case*, 7 Co. 54, a difficulty was put as possible in the event of a separation of the crowns of England and Scotland; but Lord Coke says, "albeit the kingdoms should, by descent, be divided and governed by several kings, yet it was resolved that all those that were born under one natural obedience, while the realms were united under one sovereign, should remain natural born subjects, and no aliens, for that naturalization due and vested by birthright cannot, by any separation of the crowns afterwards, be taken away; nor he that was by judgement of law a natural subject at time of his birth become an alien by such a matter *ex post facto*." The case of the provinces of Gascoyne, Guienne, Anjou, is decisive to show that the subjects of them were natural subjects, for the purpose of inheritance, not only during the time when they formed a part of the dominions of the crown, but afterwards when they were conquered by France. These provinces came to H. 2, by different titles. They were all lost in the reign of King John, and many of the principal persons in them adhered to the French king. The English estates of those persons were confiscated, but the people in general were still inheritable of lands in England, and were accounted "*ad fidem utriusque regis*." The 17 Ed. 2, *stat. de praerog. regis*, was passed to give to the king escheats of the lands which descended to persons born beyond the sea, whose ancestors were, from the time of King John, under the allegiance of the kings of France; *Stauford de praerog. regis*. During the interval between the loss of those provinces and the statute in question, there must have been several generations, yet still the descendants must have been considered inheritable. Then, thirdly, the children born, after the separation of the two countries, of American parents born before that time, are natural born subjects. The 25 Ed. 3, expressly provides for such a case, and that is only declaratory of the common law according to *Hussey, J.*, in 1 R. 3, 4. But even if it be doubtful whether that statute extends to the present case, the 7 Ann. c. 5, s. 3, explained by the 4 G. 2, c. 21, certainly applies to it. A question will be made on the words used in that act, "at the time of the birth," and it will be urged that the parents of the lessor of the plaintiff, Mrs. Thomas, had not that character at the time of her birth. It is certainly difficult to ascribe any definite meaning to those words, for it has been shown that a natural born subject must continue so, he cannot put off that character. The 4 G. 2, c. 21, was extended to grandchildren by the 18 G. 3, c. 21. The case of *Stewart v. Hume*, 6 Morrison's Diet. of Decisions, 4649, is a decision in favour of the plaintiff. In 1791, Anne Stewart, widow of George Stewart, claimed her *terce* of lands in Scotland. G. S. and his wife were born in America, before the revolt of the colonies, and continued to reside there afterwards. It was objected that she thereby became an alien, and therefore could not claim her *terce*; *but the lord ordinary held, that the claimant having been born before the revolt of the colonies was to be considered as a subject of Great Britain, residing then in a foreign country. *Gordon and Scott v. Brown*, (decided in 1810, but not reported,) is also in point: in that case Brown, the son and heir of the person last enfeoffed, was born in America, after 1783, and was held entitled to the land. In *Shedden v. Patrick*, Morrison's Diet. of Decisions, the same point was involved, but the court of session appeared to entertain no doubt about it, the whole question there turned upon the illegitimacy of the claimant. Applying to this case the observation of Lord Hale, in *Collingwood v. Pace*, 1 Vent. 427, "The law of England, which is the only ground, and must be the only measure, of the incapacity of an alien, and of those consequential results that arise from it, hath been always very gentle in the construction of the disability, and rather contracting it than extending it so severely," the court

will be fully justified in giving such a construction to those statutes, and to the doctrine of allegiance in general, as will support the claim of the present lessors of the plaintiff.

Parks, for the defendant. Mrs. Thomas, the lesser of the plaintiff, was not a natural born subject, and therefore cannot be entitled to the lands in question. In *Calvin's* case it is said, that there are three incidents to a subject born; first, that the parents be under the actual obedience of the king; second, that the place of his birth be within the king's dominion; and thirdly, at the time of his birth, the kingdom where he is born must be under the legiance of the king. The first two of these incidents show, that at common law Mrs. T. *792] would be an alien, unless under certain special circumstances. It is clear, that at the time of the birth of Mrs. T., that being after the ratification of the treaty of 1783, the United States were independent of this country, *Folliott v. Ogden*, 1 H. Bl. 123, 3 T. R. 726; and, therefore, unless her case falls within the 25 Ed. 3, st. 2, the 7 Ann. c. 5, or 4 G. 2, c. 21, she is clearly an alien. Now the statute 25 Ed. 3, s. 2, which is a declaratory act, says, "that the children born without the legiance of the king, whose fathers and mothers at the time of their birth shall be at the faith and legiance of the king, shall have the same privileges as if born within the legiance of the king." Clearly the father and mother, in this case, were not at the faith and legiance of the king at the time when Mrs. Thomas was born. The 7 Ann. c. 5, s. 3, says, "that the children of all natural born subjects born out of the legiance of her majesty, shall be deemed natural born subjects." Some doubts having arisen upon the construction of that enactment, the 4 G. 2, c. 21 was passed to remove them, and declared, "that the children were to be deemed natural born subjects only, where the parents, at the time of the birth of the children, should be natural born subjects. That statute shows, that, in the opinion of the legislature, the character of a natural born subject might be lost. The doctrine of allegiance proceeds on the ground of a mutual compact between the crown and the subject, *Calvin's* case, 7 Co. 9; and it is clear, that it cannot be dissolved by either party without the concurrence of the other; but that may be done by the mutual consent of both parties; and here, the act of the sovereign was authorized by act of parliament, 22 G. 3, c. 46. The first article of the treaty *793] is a complete renunciation of all authority on the part of the crown of Great Britain; on the side of the colonies a claim of freedom from allegiance. Mr. Ludlow, by remaining in America after the treaty, lost his character of a British subject. This was urged by Lord *Redesdale*, when arguing the case of *Somerville v. Somerville*, 5 Vez. 781, and was not denied, either by the counsel on the other side or by the court. The subsequent provision giving to the Americans a qualified right of fishing, proves that it was so understood; for had they remained subjects of the king of Great Britain, that clause would have been unnecessary. The clauses for the restoration of property are merely exceptions from that which would otherwise have followed from the first article, and do not treat the Americans and their heirs as capable of holding lands in the character of natural born subjects. The consequence of deciding for the plaintiff would be, that all Americans must be considered as subjects, with all their privileges and duties. There may be instances in which persons may be entangled in a double allegiance; but the inconvenience is so great, that the court will not be inclined to favour the doctrine of a double allegiance. The case supposed in *Calvin's* case, of a separation of the crowns of England and Scotland, is a separation by operation of law, without any dissolution of the compact by the consent of the parties. This case has been already decided in the American courts, where it has been held, that the natives of Great Britain are aliens, and incapable of inheriting lands in that country. *Bligh's Lessee v. Rochester*. (a) *Cur. adv. vult.*

(a) Wheaton's Reports of Cases in the Supreme Court of the United States, 535.

*The judgment of the court was now delivered by

ABBOTT, C.J. This was an ejectment, brought for the recovery of certain [794] lands in the county of York, whereof Elizabeth Harrison had lately died seised. Frances Mary Thomas claimed as heiress at law, and according to the pedigree, she is entitled so to claim, if she be a person capable of claiming lands in England by descent. She is the daughter of Elizabeth Harrison, afterwards Ludlow, and granddaughter of Peter Harrison. Peter, the grandfather, a native of England, went to America, and resided for many years in Connecticut, where he held the office of collector of his majesty's customs, and died in 1775. His daughter Elizabeth was married in 1781, in Rhode Island, to James Ludlow, a native of New York, who was born before the year 1776, and who continued to live in America until his death, and died there; Elizabeth also continued to live in America, and died there in 1790. Frances Mary was born in America, in Rhode Island, in 1784. The question is, whether she be the child of a father, who, at the time of her birth, according to the expression used in the statute 4 G. 2, c. 21, was a natural born subject of the crown of Great Britain.

The case was very ably argued before us, and all the authorities bearing on the question were cited; we do not think it necessary to refer again to them.

Some question was raised as to the meaning of the words, "fathers, natural born subjects of the crown of Great Britain, at the time of the birth of their children." We think the sense of these words is very plain; natural born subjects are mentioned as distinguished from subjects by donation, or any other mode. A child born out of the allegiance of the crown of England is not *entitled to be deemed a natural born subject, unless the father be, at the time of the birth of the child, not a subject only, but a subject by birth. [*795] The two characters of subject and subject by birth, must unite in the father. James Ludlow, the father of Frances Mary, was undoubtedly born a subject of the crown of Great Britain; he was born in a part of America which was at the time of his birth a British colony, and parcel of the dominions of the crown of Great Britain; but upon the facts found, we are of opinion, that he was not a subject of the crown of Great Britain at the time of the birth of his daughter. She was born after the independence of the colonies was recognised by the crown of Great Britain; after the colonies had become united states, and their inhabitants generally citizens of those states; and her father, by his continued residence in those states, manifestly became a citizen of them. This recognition of independence was made, or rather confirmed, on the 3d of September, 1783, by a treaty between his late majesty and the United States of America. Preliminary articles, which are afterwards introduced into, and form this treaty, were signed on the 30th November, 1782, after the passing of the statute 22 G. 3, c. 46, whereby his majesty was authorized to treat of and conclude a peace or truce with the several American colonies therein named. Between the signing of the articles and of the definitive treaty, several acts were passed, mentioning the United States of America, and the subjects and citizens of those states: and the name of colonies or plantations is no longer used. (See 23 G. 3, c. 20; c. 39 & 80.) Many acts of parliament, wherein the United States of America are mentioned and treated as a distinct and independent nation, have been since passed; so, that if *the sanction of the British legislature could be thought necessary [*796] to give validity to this treaty, such sanction has been abundantly given.

Then what is the effect of this treaty, as it regards the question in the present cause? By the first section, his majesty acknowledges the United States of America, (enumerating by name, as those states, the several countries that had been before, in all acts of parliament, mentioned as colonies or plantations,) to be free, sovereign, and independent states, that he treats with them as such, and relinquishes all claim to the government, proprietary, and territorial rights of the same, and of every part thereof. It is impossible to yield to one of the

observations made by the learned counsel for the plaintiff, that this is to be considered as a relinquishment of the right to the soil or territory only; a relinquishment of the government of a territory, is a relinquishment of authority over the inhabitants of that territory; a declaration that a state shall be free, sovereign, and independent, is a declaration, that the people composing the state shall no longer be considered as subjects of the sovereign by whom such a declaration is made. It was contended, however, that by some of the subsequent articles of this treaty, or by the subsequent treaty, which was ratified by the statute 37 G. 3, c. 97, it appears that persons in the situation of the lessor of the plaintiff are to be considered as the children of natural born British subjects, and not as the children of aliens. But we think no such effect can be derived from either of these treaties. The third, fifth, and sixth articles of the treaty of 1783, appear to be the only articles that have any bearing upon this question. The third article gives to the citizens of the United States a liberty *797] of fishing *on certain coasts. On the part of the defendant it was said, that if they were to be considered as British subjects, they would have this privilege in that character. At all events it is clear, that a liberty thus specially given confers no right beyond that which is so given.

By the fifth article it is agreed, that congress shall recommend to the legislatures of the respective states to provide for the restitution of confiscated estates belonging to real British subjects, &c., that persons of every description shall have liberty to go into any part of the United States, and remain twelve months, to endeavour to obtain restitution of their estates. The sixth article provides against future confiscations, by reason of the part that any person may have taken in the war. Now it is impossible to extend the effect of these two articles beyond the particular lands that might be restored, recovered or retained in virtue of them; and their effect, even as to such lands, with the future residence of their owners, and the rights of descent are not clearly defined. Then, as to the subsequent treaty; it provides only that British subjects who then held lands in the territory of the United States, and American citizens, who then held lands in the dominions of his majesty, should continue to hold them, and might grant, sell, or devise them, as if they were natives, and that neither they nor their heirs or assigns should, so far as might respect the said lands, and the legal remedies incident thereto, be considered as aliens. This article is therefore, in terms, confined to lands *then held*; in its general import, it distinguishes British subjects from American citizens; and the provision that persons should not be considered as aliens, with regard to particular lands, seems *798] to indicate very plainly, that they were considered as aliens *with regard to other lands. The inconvenience that must ensue from considering the great mass of the inhabitants of a country to be at once citizens and subjects of two distinct and independent states, and owing allegiance to the government of each, was well commented upon in the argument at the bar. If the language of the treaty could admit a doubt of its effect, the consideration of this inconvenience would have great weight toward the removal of the doubt. As we think the effect of the treaty manifested by its language, we do not think it necessary to observe upon this topic. But, for the reasons already given, we are of opinion, that James Ludlow had ceased to be a subject of the crown of Great Britain, and became an alien thereto, before the birth of his daughter, and consequently, that she is also an alien, and incapable of inheriting land in England; and judgment must be entered for the defendant.

It is a great satisfaction to us to know, that this our judgment is conformable to a decision of the supreme court of the United States of America upon a similar question, brought before that court on a claim of a British subject to land in America.

Judgment for defendant.

DUNCAN v. CARLTON.

A declaration was delivered before the assign day of Easter term, with a rule to plead within the first four days of that term: *Held*, that the defendant had all the morning of the fifth day to plead, and that a judgment signed on that morning was irregular.

THE declaration in this case was delivered before the assign day of Easter term, and a rule to plead within the first four days of that term was afterwards served. That rule expired on the 10th May. On that day, a summons for time to plead was served, returnable at three o'clock, on the 11th. Before that time the plaintiff's attorney signed judgment. *Campbell* obtained a rule to set it aside, on the ground that it was signed too soon, according to the rule laid down in *Tidd's Practice*, 1 v. 470, 8th edit. "If a declaration be delivered or filed, with notice to plead within the first four days of term, the defendant has all the morning of the fifth day to plead, and judgment cannot be signed for want of a plea, till the opening of the office in the afternoon of that day. But in any other part of the term, if the defendant do not plead within the four days, the plaintiff may sign judgment in the morning of the fifth day." *Shepherd v. Mackreth*, K. B., E. T. 25 G. 3, MS."

Patteson showed cause, and contended, that the rule there laid down could not be correct. No reason is given why a different rule should prevail as to assign declarations and others. The practice of the common pleas is clearly to allow the same time for pleading in all cases; and it is more convenient that it should be so, for different rules of practice, where there is no reason for them, can only lead to confusion.

Per Curiam (after consulting the master.) The practice in this court has for a long time continued, according to the rule given in *Tidd's Practice*; and although the rule in common pleas may be different, we think it better to abide by that which is known in this court.

Rule absolute.

*HARRISON v. BAINBRIDGE.

[*800]

A bill in equity was dismissed with costs, and the plaintiff brought an action for the same cause, and recovered a verdict. The costs in equity may be set off against the judgment, subject to the lien of the attorney.

THE plaintiff in this case commenced a suit in chancery against the defendant. His bill was dismissed with costs, which were taxed at 60*l.* 10*s.* 5*d.*, but not paid. The plaintiff afterwards commenced an action at law for the same cause of action, and recovered a verdict for 150*l.* A rule having been obtained by *Patteson* to set off the sum of 60*l.* 10*s.* 5*d.* against the judgment in that action,

Wightman showed cause, and contended, that the costs in equity could not be set off against a verdict at law, or at all events that the plaintiff's attorney had a right of lien upon the sum for which judgment was obtained.

Per Curiam. *Hall v. Ody*, 2 B. & P. 28, is decisive, as to the right of setting off the costs in equity against the judgment in this court; but it must be subject to the attorney's lien.

Rule absolute.

*KENNARD v. HARRIS.

[*801]

A party, after receiving the costs of reference and award, which by the terms of a rule of reference were to be paid by the other party, cannot move to set aside the award.

By an order of *nisi prius* this cause was referred to an arbitrator, and among other things it was directed that the costs of the reference and award should be paid by the defendant. The arbitrator made his award on the 13th of No-

venber, 1823. The plaintiff obtained a rule nisi for setting it aside. It now appeared by the affidavit of the defendant's attorney that the costs of the reference and award had been taxed and paid to, and accepted by, the plaintiff, on the 23d January, 1824, before he had moved to set aside the award.

Gaselee was now heard against the rule, and *E. Lawes* contra.

Per Curiam. The plaintiff, after accepting the costs of the reference and award, is precluded from moving to set it aside. If no award had been made, no costs would have been due; by accepting the costs of the award he admits the award to be valid, and cannot now say that it is bad.

Rule discharged.

*802]

*ATTERBOROUGH v. HARDY.

Where, in an inferior court, the damages in the declaration are laid at 10*l.* and upwards, the defendant may remove the cause without entering into a recognisance to pay the debt and costs according to the 19 G. 3, c. 70, s. 6.

An action was commenced by the plaintiff against the defendant, in the king's court of record for the town of Nottingham, to recover the sum of 8*l.* 17*s.*, for goods sold and delivered. The damages in the process and declaration were laid at 20*l.* The defendant removed the cause into this court by habeas corpus, without entering into any recognisance to pay the debt and costs. A rule for a procedendo having been obtained by Chitty on that ground,

F. Pollock showed cause, and contended, that upon the true construction of the 19 G. 3, c. 17, s. 6, the defendant was not bound to enter into a recognisance on removing the cause, as the plaintiff had thought fit to lay his damages at 20*l.*

Per Curiam. The 21 J. 1, c. 23, enacts that causes shall not be removed where it shall appear or be laid in the declaration, that the debt, damages, or thing demanded do not amount to 5*l.* The 19 G. 3, c. 70, s. 6, which enacts that no cause of action, where the cause of action shall not amount to 10*l.*, shall be removed unless the defendant enter into a recognisance, must be construed in the same sense. Now, in this case, the damages, as laid in the declaration, did exceed 10*l.* This rule for a procedendo must, therefore, be discharged.

Rule discharged.

*803]

*REMMINGTON v. JOHNSON.

A demand of a plea is necessary before signing judgment, except where defendant is in custody of the sheriff, and plaintiff has declared against him as being in that custody.

D. F. Jones had obtained a rule to show cause why the interlocutory judgment and subsequent proceedings should not be set aside with costs, and why the plaintiff or his attorney should not pay the costs of the application, on the ground that the plaintiff had signed interlocutory judgment, for want of a plea, without having demanded a plea.

Platt now showed cause on an affidavit, stating, that the defendant, at the time of the commencement of the present action, and down to the present time, was in the custody of the sheriff of the county of Huntingdon, in another suit; and he cited *Rose v. Christfield*, 1 T. R. 591; *Wilkinson v. Brown*, 6 T. R. 524, as establishing, that no demand of a plea is necessary, where the defendant is in custody of a sheriff, whether in the same or in another suit.

D. F. Jones, in support of the rule, contended, that as a general rule, the plaintiff could not sign judgment for want of a plea, without first demanding a plea; and that even supposing the exception of cases of defendants in custody of the sheriff, not to be confined to instances of defendants being in the custody of the sheriff in the same suit, but to extend to instances of the custody of the sheriff in another suit, still the exception could only apply to cases where the

plaintiff had declared against *the defendant, as being in the custody of the sheriff, and not as in the custody of the marshal; and where, [*804 therefore, the plaintiff, by his form of declaring, advertises the defendant that he means to treat him as being in the custody of the sheriff, and, consequently, that the defendant must not wait for a demand of a plea.

Per Curiam. That certainly is the distinction.

Rule absolute.

DAVIES v. ROGERS.

A rule to discharge a defendant in execution for a debt not exceeding 20*l.*, he having lain in prison more than twelve months, is absolute in the first instance, notice of the application having been served on the plaintiff.

Comyn moved, under statute 48 G. 3, c. 123, to discharge the defendant out of custody, upon an affidavit that he had lain in prison more than twelve months in execution, upon a judgment of the court of great session for the county of Montgomery; that the original cause of action did not exceed the sum of 20*l.*, exclusively of the costs of the judgment, and that notice had been served upon the plaintiff of the application; and he contended, that notice having been given, the defendant was entitled to a rule absolute at once, and not merely a rule nisi.

D. F. Jones, for the plaintiff, opposed the application, and insisted, that the defendant could only be entitled to a rule to show cause; that otherwise frauds might be committed, with regard to the time and manner of the service of notice; that the plaintiff might not have a fair opportunity of contradicting the affidavits on the part of the defendant; that uncertainty might *obtain [*805 as to the time of bringing forward the application, and that the plaintiff might not have the means of seeing that the documents in support of the application were sufficient, according to the requisites of the act; and he cited *Ex parte Nielsen*, 7 Taunt. 37, and *Magnay v. Gilkes*, 7 Taunt. 467, as being expressly in point.

The Court, however, after referring to the officers, said, that although the practice was otherwise in the common pleas; yet in this court, after notice, the rule was absolute in the first instance.

D. F. Jones then took a formal objection, arising on the face of the defendant's own affidavits, whereupon the motion was refused.

SIMONDS and LODER v. WHITE.

A loss by general average is to be calculated between owner of ship and owner of goods according to the law of the port of discharge.

ASSUMPSIT for 106*l.* 3*s.* 6*d.*, as money paid by the plaintiffs to the use of the defendant. At the trial before *ABBOTT*, C. J., at the London sittings after Hilary term, 1823, a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case:

The plaintiffs are British subjects, having a mercantile establishment in London where *Simonds* resides, and at Saint Petersburg where *Loder* resides, under the permission of the Russian government. The defendant is also a British subject, and the owner of the British ship *Mamhull*, which was chartered at Gibraltar on the 15th *of March, 1820, by *W. Cozens and Co.*, [*806 who are British subjects residing at Gibraltar, for a voyage from Gibraltar to touch at the Isle of Wight for orders, and then to proceed immediately, if so directed, to Saint Petersburg. The vessel sailed on the voyage from Gibraltar on the 20th of March, 1820, with a cargo on board, for which bills of lading were there signed in the following form deliverable at Saint Petersburg: "Shipped in good order and well conditioned by *W. Cozens and Co.*, in and

upon the good ship called the Mamhull, now riding at anchor in Gibraltar bay, and bound for Saint Petersburg, (enumeration of the goods and their marks, weights, &c., here follow,) being marked and numbered as in the margin, which are to be delivered in like good order and well conditioned at the aforesaid port of Saint Petersburg, (the dangers of the sea only excepted,) unto or assigns, (afterwards filled up unto M. W. Simonds and Co., (the plaintiffs,) or their assigns,) he or they paying freight for the said goods as per charter-party, with tonnage and *average accustomed*."

On the arrival of the vessel at the Isle of Wight, the plaintiffs purchased the cargo from the agents of Cozens and Co., and the ship afterwards proceeded on to Saint Petersburg. In the course of the voyage she struck on a reef of rocks off the island of Lessoc, when the long boat was got out, and the small bows cable and anchor were carried out to endeavour to get her off, but the tide being strong it drifted the vessel on to the cable, which was thereby rendered useless and unfit for service. Assistance was procured, and the vessel got off, she put into Elsinour, where the master purchased a new cable, and the vessel finally completed the voyage and delivered the cargo in safety under the aforesaid bill of "lading. When the vessel arrived at Saint *807] Petersburg, a statement of general average on the voyage, according to the Russian laws upon that subject, was made up and settled by an officer appointed for that purpose by the Russian government, called the *Dispacheur*. In that statement was included as a charge upon the cargo for general average, the sum of 106*l.* 3*s.* 6*d.* for the cost of the new cable beyond the old one, surveying the old cable, weighing and getting the new cable on board, the duty payable on the foreign cable when brought into England, and the new cable's proportion of the above charges, which are admitted to be general average according to the laws of Russia; and the plaintiffs were called upon to contribute to general average so calculated, and by the laws of Russia they were obliged to pay the sum demanded in order to get possession of the cargo. The cargo of the Mamhull was insured by a policy effected in London, the underwriters upon which refused to allow the cable and the charges connected with it as part of the loss. On the 21st of February, 1821, the plaintiff, Simonds, wrote a letter to the defendant demanding payment of the said sum of 106*l.* 3*s.* 6*d.* The case was argued in the last term, by

F. Pollock for the plaintiff. The general average ought to have been calculated according to the laws of England, and not according to the laws of Russia, and the defendant having claimed and received the money on grounds not tenable, and the plaintiffs having been compelled to pay it in order to obtain their goods, the sum so paid may be recovered back in an action for money had and received. The question is to be decided on the *808] same principle as if the defendant was now "suing for average in an English court of justice. All the parties to the contract were British subjects, and the ship was a British ship. In *Power v. Whitmore*, 4 M. & S. 141, it was decided that the insurer of goods shipped to a foreign country was not bound to indemnify the assured, a subject of that country, against general average, which by a decree of a court there he was obliged to pay, but which, by the law of this country, he was not liable to pay; and Lord ELLENBOROUGH in that case says, that "the contract must be governed in point of construction by the law of England, unless the parties have contracted on the footing of some other known general usage among merchants relative to the same subject." The accident in this case happened before the vessel reached the Russian dominions, and it ought to be considered with reference to this question in the same light as if it had happened in the river Thames, and then it is quite clear that the average must have been calculated according to the law of this country. In this case it does not appear that when the vessel left Gibraltar, it was settled

that she was to go to Saint Petersburg as the place of her final destination; she was only to go there if so directed.

Whateley contra. The decision in *Power v. Whitmore* does not govern the present case. The question there arose upon a policy of insurance, an instrument in general and familiar use, and of known meaning in England, and upon a contract which could only be enforced in this country. Here the question arises upon a bill of lading, and the payment of average, if any should *become due, is implied by the general law merchant. In that case too, [*809 the question arose between the underwriter and the owner of the goods; in the present, it arises between the owner of the ship and the consignee of the goods, and the rights and liabilities of the one are very different from the rights and liabilities of the other. In that case it was not stated, that the average was settled according to the law of the place where the adjustment was made; in the present case it is so stated. Now it is quite clear, that by the general law and custom of merchants, as appears by the most celebrated works on marine law of this and other countries, that the master of a ship has a lien upon the goods at the port of discharge for any average which may become due during the voyage. Consulat de la mer, Paris edition, 1808, section 225. Complete Body of Sea Laws, section 33, article 31. Wellwood's Abridgement of Sea Laws, edition 1613, tit. 21, page 47. Bynkershoek *Questiones juris Privati*, liber 4, c. 24. Malyne's *Lex Mercatoria*, 2d edition, page 113. Beawes's *Lex Mercatoria*, edition 1813, tit. *Average*, p. 245. Ordinance of Lewis the Fourteenth, book 3, tit. 8. Du Jet. article 21. Abbott on Shipping, 257. The parties, therefore, in this case, must be supposed to have contracted upon this understanding. And if the master has a lien at the port of discharge, it seems to follow as a necessary consequence, that the average must be calculated and adjusted according to the law which prevails there, for it would be absurd to suppose that he can have a lien at the port of discharge for average which is to be calculated according to the law of another country. In this case the bill of lading mentions that the vessel is bound to Petersburg, and it was therefore known to *the parties to the contract, that if an average loss occurred [*810 upon the voyage, it must be adjusted at that place.

Cur. ad. vult.

ABBOTT, C. J., now delivered the judgment of the court. The question in this case is, whether the plaintiffs, the proprietors of certain goods carried on board the defendant's ship from Gibraltar to Petersburg, and who were compelled at Petersburg to pay to the defendant, in order to obtain possession of their goods, a sum of money as a contribution to a general or gross average, settled at Petersburg according to the law of Russia, can recover back so much of the money thus paid, as would not have been charged to them on an adjustment of average made according to the law of England, the ship being a British ship, and all the parties British subjects. And we are all of opinion that the plaintiffs cannot recover back this money.

On the part of the plaintiffs it was contended, that the case must be considered exactly as it would be, if the defendant were now suing for average in a British court. The authority cited for the plaintiffs, is the case of *Power v. Whitmore*. That case, however, cannot govern the present for two reasons; first, because it arose between different parties, and on a different species of contract, namely, a policy of assurance. And, secondly, because in the opinion of the court, the facts there stated did not show that the average had been adjusted according to the established law and usage of the country wherein the adjustment was made: whereas the present case arises between a shipper, or rather his assignee and *the ship-owner, and it is an admitted fact that [*811 the average was adjusted according to the law of Russia.

The principle of general average, namely, that all whose property has been

saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract, as between the parties to the contract: but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle. But in one point all agree; namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo. I believe also, that all are agreed on another point; namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them, shall be either paid or secured to his satisfaction. This appears by the case to be the law of Russia. This power is noticed in the civil law, Dig. lib. 14, tit. 2, 2. It is expressly given in the Consulat, c. 98, recognised by Cleirac in his commentary on the *Jugemens d'Oleron*, p. 35, and allowed by the French Ordinance of Marine, tit. *Du Jet*, art. 21. If then the average is to be adjusted at the place of destination, by what law shall it be adjusted?

One may suppose the case of a British ship carrying to a foreign port the goods of British subjects only, and *delivering them to British subjects there. But such a case will rarely occur: some, at least, of the consignees of the goods will usually be foreigners. The present is not found to be a case of that singular description, and must therefore be taken to be of the usual kind. And where there are several shippers, even if all are British subjects, it will, in the case of jettison, be for the interest of the person whose goods have been lost, that the master should exercise his power of detention in order that the expense and inconvenience, and delay of actions and suits may be avoided. And if, as in the present case, the original loss has fallen upon the ship, the master *may* certainly exercise that power for his own safety, which, in other cases, he ought often to exercise for the safety of other persons. Now, if the goods belong entirely to the persons of the nation where the ship has arrived, they cannot with any reason complain of an adjustment made under the authority of their own law. In such a case it would hardly be contended, that as between them and the master, or between some and others of them, the adjustment ought to be regulated by any other law than their own. Then suppose, which will perhaps be the most usual case, that the goods belong to persons of different nations, the adjustment must be made either according to some one law regulating the whole, or it must be made in parts, according to as many different laws as there happen to be persons of different nations concerned in the adventure. The latter mode would be attended with great confusion, perplexity, and inequality, even if it should be found practicable, which in many cases it would not be. In this case also, therefore, the law of the country must prevail. And this will not impugn any known doctrine *or rule of the English law. The shipper of goods, tacitly, if not expressly, assents to general average, as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average, he must be understood to assent also to its adjustment, and to its adjustment at the usual and proper place; and to all this it seems to us, to be only an obvious consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made. I am to be understood as speaking of a case depending upon general rules and reason, and not upon a special or particular contract. It is of infinite importance to maritime commerce, that its regulations should be as simple and as few in number as general justice will permit. The wisest and most equitable rules

may occasionally, in a particular case, be productive of an inconvenience, but such occasional and particular inconvenience is a much less evil, than the confusion and uncertainty that never fail to accompany a multiplicity of minute regulations. For these reasons we are of opinion that the defendant is entitled to our judgment.

Judgment for the defendant.

*The KING v. The Inhabitants of CATESBY.(a)

[*814

A parish certificate, purported to be granted in 1761 by A., the only churchwarden, and B., the only overseer of the parish: *Held*, that it must now be taken to have been a good certificate, because it may be intended in favour of such an instrument, that by custom there was only one churchwarden in the parish, and that two overseers had been originally appointed, but that one of them died, and that the certificate was granted before the vacancy in the office was filled up.

UPON appeal against an order of two justices for the removal of George Cox, his wife and child, from the parish of Badby in the county of Northampton, to the parish of Catesby in the same county, the sessions confirmed the order, subject to the opinion of this court on the following case:

The respondents produced a certificate, dated the 10th of May, in 1761, stating that William Goodman, the only churchwarden, and Edward Webb, the only overseer of the poor of the parish of Catesby, in the said county of Northampton, did thereby certify the churchwardens and overseers of the poor of the parish of Badby in the said county of Northampton, that they did own and acknowledge Thomas Cox the younger, of Badby aforesaid, butcher, and Mary his wife, and Richard, John, and Elizabeth, their children, to be inhabitants legally settled in their said parish of Catesby. The certificate then proceeded in the usual form, and purported to be duly executed by the churchwarden and overseer, and was allowed by two justices of the peace. It was proved that Thomas Cox, in the certificate mentioned, had a son named Thomas, who was born *after the certificate was granted, and that the pauper George was the son of [the last-mentioned Thomas. [*815

Reader, Marriott, and Ellis in support of the order of sessions. This is a good certificate, although it was signed by only one churchwarden and one overseer. The 8 & 9 W. 3, c. 30, s. 1, certainly requires the certificate to be signed by a majority of the churchwardens and overseers for the time being. But this certificate has been submitted to by the parish of Catesby for sixty years: every intendment, therefore, ought to be made in favour of it. *Rex v. Hinckley*, 12 East, 361. By custom there may be only one churchwarden in a parish. *Rex v. Earl Shilton*, 1 B. & A. 275. Two overseers may have been appointed originally; one of those may have died, and the certificate may have been signed at a time when there was one overseer only, and if that were so, it was signed by a majority of the churchwardens and overseers, as required by the statute. This is distinguishable from *Rex v. Clifton*, 2 East, 168, because it was proved that only one overseer had been appointed for the township for that year, and that appointment was clearly bad. It lay upon the other side to show by evidence that only one overseer was originally appointed in this case.

Holbeck and Adams contra. The certificate being dated so far back as 1761, no evidence could be given to show the state of the parish at that time. *Rex v. Hinckley* only establishes that a reasonable intendment may be made to support such an instrument. Now in order to support this certificate, it must be intended, *first, that two overseers were originally appointed at Easter, or within one month after. Secondly, that one of these overseers died [the [*816

(a) In pursuance of a warrant issued ten days before the end of term, three of the judges of this court sat on this as upon former occasions, from Tuesday, the 1st, until Saturday, the 5th of June inclusive; and from Wednesday, the 9th, until Thursday, the 17th of June inclusive, and heard this and the several following cases argued.

before the 20th May, the date of the certificate; and, thirdly, that no other had been appointed at that time. The overseer so supposed to have been dead on the 20th May, must have been alive at the latter end of March or the beginning of April, (if he was appointed on Easter day,) or within one month afterwards. The presumption of law is, that he continued alive at the time when the certificate was granted. But supposing him to have died soon after his appointment, another might have been appointed by two justices, under the 17 G. 2, c. 38, s. 3. Until the vacancy was filled up there was not a body of officers existing capable of granting the certificate. There must be two overseers to execute the functions delegated to that body.

BAYLEY, J. I am of opinion, both upon the authorities cited and upon the principles to be deduced from them, that this is a good certificate. It is signed by one churchwarden and one overseer only; and it is said that by law there must be two overseers at least, and two churchwardens, and therefore that this certificate is not signed by a majority of the overseers and churchwardens, as required by law. There are two statutes which bear upon this subject, the 43 Eliz. c. 2, and the 8 & 9 W. 3, c. 30. The first section of the 43 Eliz. c. 2, s. 1, requires that there should not be more than four nor less than two overseers of every parish. Section 5 authorizes the said churchwardens and overseers, or the greater part of them, to bind poor children apprentices, &c. The 8 & 9 W. 3, c. 30, s. 1, directs that a parish certificate should be under the
 *817] hands and seals of the churchwardens and overseers, or the major part of them. Both these acts require the concurrence of the churchwardens and overseers, or the greater part of them. The decisions, therefore, which have taken place upon the 43 Eliz. s. 5, with respect to binding out poor apprentices are applicable to cases arising upon certificates under the 8 & 9 W. 3, c. 30, s. 1. In *Rex v. Hinckley*, 12 East, 361, an objection was taken to a parish indenture that it was signed only by one churchwarden and one overseer. The court, however, held, that if by any intendment of law the indenture could be good, that intendment ought to be made, and they did intend that as, by custom, there might be only one churchwarden in a place, there were only one churchwarden and two existing overseers at the time when the indenture was executed, and therefore that the two who did execute, were a majority sufficient to bind the apprentice. Generally speaking, there ought to be two churchwardens in every parish; but by custom there may be one. By law two overseers must be originally appointed; but the two overseers so appointed may by death have been reduced to one, and in that case one overseer and one churchwarden would constitute the major part of the persons originally appointed. I think, therefore, that in this case, we may intend that at the time when this certificate was granted, Webb was the surviving overseer of two who had been originally appointed. This case differs from that of *Rex v. St. Margaret's, Leicester*, 8 East, 332, because there it was stated as a fact in the case, that one overseer only had been originally appointed. So in *Rex v. Clifton*, 2 East, 168, it was found that at the time of
 *818] granting the certificate, Warrington was the only overseer appointed for the township. The cases of *Rex v. Hinckley* and *Rex v. Earl Shilton*, 1 B. & A. 275, establish that a binding of a poor apprentice by one overseer and one churchwarden may be good. Besides the general rule of law as to presumption is, that a thing is not to be presumed non rite actum, and as the law absolutely requires an appointment of two overseers in the first instance, we ought, in the absence of any evidence to show what the real appointment was, to presume that the parties had conformed to the law, that two overseers had been originally appointed, and that one had died before the certificate was granted; and if we make that presumption, then the certificate must be taken to have been granted by the majority of the churchwardens and overseers, as required by the statute. For these reasons, I think that the order of sessions ought to be confirmed.

HOLBOYS, J. I am of opinion, both upon the authorities cited and upon principles of law which ought to govern this case, if those authorities had not existed, that this is a good certificate, or rather that the justices might legally intend it to be a good certificate. It has been submitted to by the parish for a period of sixty years. If any intendment therefore can be made to support it, it ought to be made. Now, as by law, two overseers must have been originally appointed, the instrument could not correctly describe Webb as an overseer, unless he had been appointed jointly with another. The presumption to be raised, therefore, is only *in favour of what is stated on the face of the certificate. If upon the trial of an issue, whether Webb was an over- [*819] seer of the parish of Catesby or not, it had been proved that he was the only person appointed to the office of overseer for that year, the jury must have found that he was not an overseer at all, because the law requires that there should not be less than two overseers originally appointed. The certificate, therefore, would have been bad, notwithstanding the length of time during which it had been submitted to by the parish. I am of opinion, that in favour of what appears on the face of the certificate, the justices were well warranted in drawing the inferences that two overseers had been originally appointed, and that one had died before the certificate was granted. The authorities cited in the argument fully establish that every intendment ought to be made in favour of the certificate; but independently of those authorities, I think, that upon established principles, the sessions have drawn the proper conclusion.

LITLEDAL, J. It appears on the face of the certificate that it was granted by only one churchwarden and one overseer. Now that is not sufficient, unless the law warrants the intendment of some facts, by means of which one churchwarden and one overseer may at that time have been the majority of the churchwardens and overseers. Now, by custom, there may be only one churchwarden, and therefore in this case, we may presume that one only was appointed. The appointment of one overseer would be illegal, and therefore we must intend that two were originally appointed, and that one of them had died before the certificate was granted, and that no other had been then appointed in his stead; and if we may *intend those facts, then the certificate was granted [*820] by a majority of the body. It is a general intendment of law, that every thing is to be presumed rightly done unless the contrary appear. It is also an intendment of law, that a party who has been proved to have been alive at a given date, is presumed to be alive for a certain period afterwards unless the contrary be shown. These two intendments clash in this particular instance; but I think that, in favour of what appears on the face of the certificate, the more general intendment ought to prevail. In *Rex v. Earl Shilton*, there could not be any such intendment, because it was shown on the face of the case that the appointment originally was bad. It lies upon the party insisting that it is void to prove that it is so. In *Rex v. Morris*, 4 T. R. 550, an order of justices appointing A., of the parish of B., to be overseer of the poor of the hamlet of C., was held to be a good appointment; and Lord KENYON expressly lays it down, that every thing is to be intended in support of an order of justices. Upon the same principle, I think that every thing ought to be intended in favour of a certificate sanctioned by two justices, and therefore that the order of sessions was right.

Order of sessions confirmed.

*WILLOUGHBY v. BACKHOUSE and MARSHALL. [*821]

Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized.

CASE for an excessive distress. Plea, not guilty. At the trial before BOSANQUET, Serjt., at the last Summer assizes for Buckinghamshire, the following

facts appeared in evidence: The plaintiff occupied a farm belonging to the defendant, Backhouse, and on the 26th of September, 1822, the other defendant Marshall, as agent for Backhouse, distrained for 175*l.* which was then due for rent, and seized all the live and dead stock on the farm, and the household furniture, goods, and chattels on the premises, to the value of 1000*l.* On the same day the plaintiff executed the following agreement. "To Mr. T. Marshall. You having, as the agent of T. J. Backhouse, Esquire, this day entered a distress on my effects, at Haverfield Lodge, for the sum of 175*l.* rent, which you claim to be due from me to the said T. J. Backhouse, at Lady-day last, I hereby authorize and empower you to hold possession of the same effects until the 15th day of October next, or until such other period subsequent to the expiration of the five days mentioned in your notice of distress as you may think proper; and I also authorize and empower you to convert the same effects into money, by the sale and disposition thereof, either by public sale or private contract, and at such time as you may think expedient. And I authorize you to dispense with the form of appraisement required by law in the case of a sale under a *822] distress for rent, and to make such public or private sale *without any such appraisement. And I also authorize and empower you, from the produce of the said effects, to pay or retain as well the said sum of 175*l.*, as also the further sum of 125*l.* which, on the 29th of September instant will, according to your claim, have become due for a further half-years' rent, making altogether the sum of 300*l.*, together with the costs of distress and of such sale and disposition, subject to such reduction as, by the agreement entered into between us, I am entitled to upon quitting possession of the premises in my occupation, for the amount of the outgoing valuation, so that such valuation be completed before the sale of my said effects." On the 30th of September, Marshall made another distress for 125*l.* which became due on the 29th, and again seized all the property on the farm, subject to the former distress. Before either of the distresses the plaintiff had made preparations for leaving the farm, and had advertised a sale of his effects. In order that the sale should not be prejudiced it was agreed between him and Marshall, that the sale should proceed according to the original intention, and not as a sale under a distress, and that the landlord should be satisfied out of the proceeds, which agreement was carried into effect. The learned judge told the jury that there were two questions for their consideration, first, whether the distress was excessive, of which he said there could be no doubt: secondly, whether the agreement, signed by the plaintiff on the 26th of September, was an acquiescence on his part in that which had been done by Marshall. That if they thought it was, it was an answer to the action. The jury having found a verdict for the defendants, Cooper, in Michaelmas term, obtained a rule for a new trial, on the ground that the direction of a learned *823] judge was not correct in point of law, for that the agreement was not any waiver of the right of action created by the wrongful seizure of the property.

Storks and *Dover* now showed cause, and contended, that it must be taken upon that agreement, together with the other circumstances proved respecting the actual sale of the property, that the plaintiff was a party to the whole transaction; that he ratified the whole ab initio, and therefore could not afterwards complain that it was wrongful. If so, the verdict found under the direction of the learned judge was right.

Cooper contra, was stopped by the court.

BAYLEY, J. This is a very plain case. When a landlord is about to make a distress he is not bound to calculate very nicely the value of the property seized; but he must take care that some proportion is kept between that and the sum for which he is entitled to take it. Now, here the rent in arrear, at the time of the first distress was 175*l.*, and the goods seized were worth 1000*l.*, the distress, therefore, was clearly excessive, and upon the seizure being made

a right of action was vested in the plaintiff. Was that right of action destroyed by the agreement made afterwards? It gives no satisfaction to the tenant, he makes no stipulation not to sue for that which had been done. The landlord, indeed, has further power given to him, but I do not find that the tenant receives any thing. Such a document is no answer to such an action as the present. I think, therefore, that the question was not properly *left to the jury, and that the rule for a new trial must be made absolute. [*824

HOLROYD, J. Whatever affect the agreement in question might have upon the jury when estimating the damages, clearly it does not amount to a satisfaction in law, or a release of a right of action. The plaintiff, therefore, was entitled, upon the evidence, to a verdict in his favour, and there ought to be a new trial.

LITLEDALE, J. The plaintiff does not by the agreement profess to waive his right of action. But even if he did, still it would not be a sufficient answer; for a right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done. This rule must, therefore, be made absolute.

Rule absolute.(a)

(a) See *Sells v. Hoare*, 1 Bing. 401.

THORNTON v. ILLINGWORTH.

A promise made after the commencement of an action is not sufficient to sustain a replication that the defendant (who had pleaded infancy) ratified his contract after he came of age.

ASSUMPSIT for goods sold to the defendant for the purposes of trade. Plea, infancy. Replication, that defendant ratified the contract after he came of age. At the trial before HOLROYD, J., at the last Summer assizes for Yorkshire, the plaintiff's evidence in support of the replication was confined to a promise made by the defendant after the commencement of the action. It was objected for the defendant that this was *insufficient. The learned judge reserved the point, and the plaintiff having recovered a verdict, *Brougham*, in [*825 Michaelmas term, obtained a rule to enter a nonsuit.

J. Williams now showed cause. The point now presented to the court is new, and has not been touched upon in any case to be found in the books. Now it cannot be doubted, that a person may, by an express promise made after he is of age, bind himself to pay debts contracted during his infancy; and the only question is, whether the promise proved in this case was made in time to support the action. This may be likened to cases upon the statute of limitations, in which a new promise is necessary in order to render a man liable to pay an old debt, yet in such cases a promise made after the commencement of the action is sufficient. *Yea v. Fouraker*, 2 Burr, 1099.

Brougham and *Starkie* contra were stopped by the court.

BAYLEY, J. There is this distinction between the case cited and the present. There the debt continued from the time when it was contracted, but without the new promise it could not have been recovered, the defendant relying on the protection given by the statute of limitations. The ground on which that statute proceeds is, that after a certain time it shall be presumed that a debt has been discharged. A new promise rebuts that presumption, and then the plaintiff recovers, not on the ground *of having a new right of action, [*826 but that the statute does not apply to bar the old one. In the case of an infant, a contract made for goods, for the purposes of trade, is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts. If he makes a promise, after he comes of age, that binds him on the ground of his taking upon himself a new liability, upon a moral consideration existing before; it does not make it a

legal debt from the time of making the bargain. The form of the replication used in such cases confirms this view of the question, the promise is always laid to have been made before the commencement of the action. *Cohen v. Armstrong*, 1 M. & S. 725; *Baylis v. Dineley*, 3 M. & S. 477. For these reasons I think that the present action was not supported by evidence of a promise made after its commencement.

HOLROYD, J. This differs from a question upon the statute of limitations: that proceeds upon the supposition that the evidence of the defence has been lost by the lapse of time. Here there was no legal right capable of being enforced in a court of law at the time when the action was commenced. Where the statute of limitations has run, a new promise revives the debt ab initio, and that is equally the case whether the promise is made before or after the commencement of the action. Here no ground of action, capable of being enforced in a court of law, existed at the time when the action was brought; there was *827] no foundation upon which the action could rest. The new promise was the sole ground of action, and not the revival of an old one.

LITTLEDALE, J. When the statute of limitations is relied upon, an acknowledgment admits the perpetual existence of the debt, and therefore it suffices whether it is made before or after the bringing of the action. But the contract of an infant, under such circumstances as the present, being void and not voidable, the promise in this case did not prove that any legal cause of action existed at the time when the action was commenced. The rule for entering a nonsuit must therefore be made absolute.

Rule absolute.

RICHARDSON and Another v. WALKER.

A custom which binds the tenants and residents within a manor to grind at the lord's mill "all their corn and grain which they use ground in their dwellings," does not prevent them from buying and using in their dwellings flour produced from corn ground at other mills.

THIS was an action upon the case, brought pursuant to an order made by the vice-chancellor. The declaration stated, that the plaintiffs had been and then were lawfully possessed of a certain mill, with the appurtenances, within the manor or lordship and town of Selby, in the county of York, and by reason thereof were entitled to have the toll of all the corn and grain ground at their mill: "that all the tenants, residents, inhabitants, and dwellers of and within the manor or lordship and town aforesaid, during all the term of the plaintiffs' possession of the said mill ought to have ground, and still of right ought to grind *828] at the said mill all their corn and grain, which, after the grinding thereof, had been or should be expended or consumed in a ground state, in their respective dwellings or dwelling-houses, within the said manor or lordship and town, and to have paid and yielded to the plaintiffs, for the grinding thereof, certain ancient and customary toll." Yet the said defendant, well knowing the said premises, but contriving to injure the said plaintiffs, and to deprive them of the profit and advantage of their mill, and of the toll which would have accrued to them, for the grinding of the corn and grain thereafter next mentioned, and to enable and procure the said tenants, &c., to withdraw their grist from the mill, afterwards, to wit, on, &c., at &c., did fraudulently and wrongfully grind or cause to be ground, at another mill, or at other mills than the mill of the plaintiffs, a large quantity of corn and grain, for the purpose of exposing the same to sale, and selling the same in a ground state, within the manor, to the other tenants, residents, inhabitants, and dwellers of and within the manor, &c., to be by them expended in their respective messuages or dwelling-houses within the manor, &c., and then and there fraudulently and wrongfully did expose to sale, and did sell, by himself and one Susannah Walker, his agent in that behalf, the last-mentioned quantities of corn and grain

so ground as aforesaid, and so being in a ground state as aforesaid, within the manor, &c., to divers persons, residents and inhabitants and dwellers of and within the manor, &c., to be expended and consumed in their respective messuages or dwelling-houses within the manor, &c., and which last-mentioned corn and grain so ground as aforesaid was afterwards, by the said several *persons, used and expended in their respective messuages or dwelling-houses, to wit, &c., whereby the tenants, residents, inhabitants and [*829 dwellers of and within the manor, &c., did supply themselves, from such exposing to sale and selling as aforesaid by the defendant, with divers large quantities of corn and grain in a ground state, to be expended and consumed in their dwelling-houses, which but for such exposing to sale, and selling ground by defendant as aforesaid, they would have ground or caused to be ground, or would have purchased when ground at the mill of the plaintiffs. Plea, not guilty. At the trial before BAYLEY, J., at the York Lent assizes, 1820, the jury found a verdict for the plaintiff, with 1s. damages, subject to the opinion of this court, upon the following case:

The plaintiffs, at the time of the committing of the grievances alleged in the declaration, were in possession of the mill hereinafter described as the lessees thereof, under the lord of the manor of Selby. Before the alterations hereinafter mentioned, there were two ancient water corn mills, belonging to the lord of the manor of Selby, and situate within the manor or lordship and town of Selby. Between fifty and sixty years since these two mills were pulled down, and one water corn mill was erected instead thereof, upon their site, having a wind corn mill over the same. About the year 1806 the streams of water by which the water corn mill had been worked, were diverted from the mill, under the authority of the act of parliament, and in the manner hereinafter mentioned, and the water corn mill has been ever since and still is worked by steam instead of water. From time *immemorial there had been an ancient custom within the manor of Selby, and which was established by two decrees of the [*830 court of exchequer, the first in the 3 Car. 1, the last in the 4 G. 2, "that all and singular the tenants, residents, inhabitants, and dwellers, of and within the said town and manor of Selby, used and were accustomed, and of right ought to grind all *their* corn and grain, as well growing within the said manor, as brought from other places and spent ground in their houses within the said manor and town, at the said ancient mills of the said lord, called Selby Mills, paying a certain toll or mulcture for the same, according, &c.;" and this custom still continues to exist within the manor, and to be applicable to the present mill, unless the alteration of the mill, as before described, or any other circumstances stated in this case, shall be deemed to have extinguished, destroyed, or suspended the custom. By an act of parliament, passed in the 45 G. 3, intitled "An act for draining and improving certain low grounds and carrs within the parishes, townships, and places of Selby, Brayton, Thorp, Willoughby, Hambleton, Wistow, Scaln Park, Caword, Sherburn, Lamerton, Rest Park, South Melforth, and Barkston Ash, in the west riding of the county of York;" a power was given to a commissioner therein named, either to agree with the proprietors of and persons interested in any mills, weirs, dams, lands, tenements, and hereditaments which the commissioners should judge necessary or expedient to be made use of for the purposes of the act, or which might be liable to be damaged in the execution of the act, for the purchase of such mills, weirs, dams, lands, tenements, and hereditaments, or for the recompense to be made to such proprietors and persons interested, for the damage they *might sustain, or for any eventual injury that might arise to their property, [*831 by the execution of any of the powers contained in the act." Under this act the commissioner agreed with the guardian of the honourable E. R. Petre, then a minor, (the said E. R. Petre being lord of the manor of Selby and owner of the said mill,) in the following terms, viz., "April 22,

1806, I. W. S., do, in pursuance of an act of parliament, entitled, &c., settle and ascertain, that the sum of two thousand pounds be paid unto Lady Petre, guardian to her son, E. R. Petre, as a recompense and compensation for the damage which may happen and be done, by totally taking away the water from the mill at Selby, in order to make a free and sufficient effluxion of water into the river Ouse, and also the sum of 100*l.* be paid to the said Lady Petre, guardian as aforesaid, for the stone and materials of the present weir, on the said dam adjoining the mill, in order to enable me to erect clough doors, and other useful purposes which the same may be wanted for, and making together 2100*l.*, which I think a fair equivalent and compensation for the same." The defendant is not a resiant or inhabitant within the manor and town of Selby, but he did, from time to time, between the month of April, 1813, and the commencement of the action, and whilst the plaintiffs were so possessed of the mill as aforesaid, cause to be offered and exposed to sale, in the house of Susannah Walker, his mother, situate within the manor or lordship and town of Selby; and Susannah Walker, as his agent and on his behalf, did sell there, to divers of the resiants and inhabitants of and within the said manor, lordship, and town, to be spent and consumed within their respective houses and dwellings within *832] the said manor or lordship and town, about eighty stone *per week of meal and flour, partly manufactured and baked into bread, and partly unmanufactured, being the produce of and obtained from wheat, corn, or grain not ground at the mill of the plaintiffs. The defendant had notice of the existence of the custom at the time of such offering and exposing to sale, and of such sale, and also knew that the corn and grain so by him caused to be exposed to sale, had not been ground at the plaintiffs' mill.

Tindal for the plaintiffs. Three objections will be made to the right of the plaintiffs to recover in this action. First, that an action cannot be maintained against the defendant, who is not a resiant within the manor, and only enabled a third person to commit the alleged breach of the custom. Secondly, that it was not a breach of the custom to bring flour into the manor and sell it there. Thirdly, that the alteration of the mill has extinguished the custom. As to the first point, it may be considered first, as the case of an entire stranger; secondly, as the act of a stranger, by means of an agent who was a resiant. In Com. Dig., tit. *Action on the Case for Disturbance*, there are several instances of actions against strangers, and in the general title, *Action upon the Case* (A), it is said, "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." Here the lord sustains a loss by the wrongful act of the defendant, the present action is therefore sustainable against him. In *Green v. Robinson*, Hardr. 174; Vin. Abr., *Mill* (B), S. C., the lord had a soke mill, and the defendant had erected *833] "another mill out of the manor, near to the said mill. The court of exchequer said, "If the owner or tenant of such a mill, out of the manor, cause or persuade any of the tenants or resiants within the manor to grind there he may be prohibited by decree of this court." An action may lie against the resiant who sold the flour, but that does not prevent the plaintiffs from recovering against this defendant. In Roll's Abr., *Action sur Case* (N), pl. 4, it is said, "If, on a sale in a fair, a stranger disturb the lord in taking the toll, an action on the case lies for this; and the Year Book, 9 Hen. 6, 45, is cited. There an action would be maintainable against the buyer for the toll; but the instance put is of an action against a stranger, between whom and the lord there was no tenure or duty; and the same appears from the *Abbott of Evesham's case*.(a) If that be so with respect to a mere stranger, a fortiori, an action lies against this defendant, who procured a resiant within the manor to sell the corn for his benefit. He may be considered as identified with his agent. It is a much stronger case than

(a) Cited in the *Earl of Shrewsbury's case*, 9 Co. 50 b.

Green v. Robinson, for the sale here was made in a place over which the custom extends. [BAYLEY, J. Is there any allegation in the declaration, that sufficient corn was produced within the manor for the supply of the inhabitants?] No, but if there were not, that should have been shown as matter of defence. Then, as to the second point, the custom is altogether nugatory, unless the act done in this case be considered a breach of it: to hold that it is not, would be a great hardship on the lord. He is, by this custom, bound to keep a mill in repair, to provide servants to work it, horses and carts to carry home the *flour, and must give a preference to the resiants when they bring corn to be ground. He cannot convert his mill to any other use. On the other hand the resiants are bound to bring there all the corn which they use in a ground state within the manor. But the point was decided in *Cort v. Birkbeck*, 1 Doug. 218, and the case of the *Manchester Mills*, ib. 222, n. 13, which cannot be distinguished from the present case. The custom established as to the Selby mills, by the decree 3 Car. 1, is as large as that which was laid and proved in *Cort v. Birkbeck*. Then as to the third point, the alteration of the mode of working the mill, by the use of steam instead of water, cannot destroy the custom. Bro. Abr., *Grant*, pl. 162. A person having a prescriptive right to a stream of water to work a fulling mill, does not lose his right by converting it into a corn mill. *Luttrell's case*, 4 Co. 86. Nor can it be said that the right of the plaintiff was bought out under the act of the 45 G. 3. The sum awarded to Lady Petre was for the damage sustained by the loss of the water, not for the loss of the soke, and was probably given to cover the expense of altering the mill.

Parke contra. The obligation to grind at a particular mill arises from tenure or prescription, which supposes an agreement, and the action by the lord for neglecting to do suit to his mill, can only be against a tenant, or a party to such agreement, or some person who places himself in the situation of a party. The lord, therefore, cannot maintain an action against this defendant, who is merely in the situation of a person persuading another to break an agreement. The present case is very different from that of fairs and other *similar franchises. They are of a public nature, and, emanating from the crown, bind all the king's subjects; and therefore a person persuading another not to pay toll, as much breaks the law as the person persuaded; or if a person be persuaded not to attend a fair, no action lies against him for staying away, and, therefore, unless the party using the persuasion were liable, the lord would be without remedy. Here an action would, if at all, lie against the resiant who sold the flour. In the case of trades an action lies for taking away a man's custom by means of a slander, but not by setting up another shop, which is in substance the act of the defendant in this case. There is a great difference between the case of a person even setting up a new mill, and the case of a tenant neglecting to do suit at the lord's mill. *Prior of St. Neots v. Weston*, 22 H. 6, pl. 23; *Keeble v. Hickeringill*, 11 East, 574 (n); and also between fairs, or ferries, and mills. *Blissett v. Hart*, Willes, 512, n. Here no obstruction was offered to those who were going to the lord's mill. *Green v. Robinson* is only an instance of the interference of a court of equity, and cannot be considered as deciding this question in a court of law. Secondly, even if the defendant were a resiant within the manor, selling flour there, produced from corn grown and ground elsewhere, would not be a breach of the custom alleged and proved in this case. The custom alleged and established by the decrees produced is, "that the tenants and resiants shall grind all *their* corn and grain, which, after grinding, shall be used ground in their dwellings." Now, the case of *Ord v. Buck*, 8 Br. P. C. 106, *establishes that such a custom is very different from one which requires the tenants and resiants "to grind at the lord's mill all *the* corn and grain which they use ground," for where the latter custom prevails the tenants and resiants can

not buy flour, but in order to obtain it must buy corn, and send it to be ground at the lord's mill. By that decision *Cort v. Birkbeck* was overruled. [ABBOTT, C. J. In the latter case the defendant was placed in great difficulty by the course pursued of demurring to the evidence.] Thirdly, the custom established by the decrees, produced as evidence in this case, was attached to two water corn-mills, and was therefore destroyed by the alteration of the mills. Had the custom been attached to "the lord's mill" it might have sufficed.

Tindal in reply. In the case of *Ord v. Buck*, a suit was instituted against several defendants, one of whom was charged with an offence precisely similar to that for which this action was brought. A decree was set out, by which it appeared, that "the tenants residing within the manor of Leeds were bound to grind at the lord's mills in Leeds, all their corn and grain which they used ground in their dwellings." [ABBOTT, C. J. The defendants there contended, that they were not by that custom and decree restrained from buying flour of corn ground elsewhere.] That was so, but witnesses having been examined for the defendants, setting up a custom for the tenants to buy flour of corn ground elsewhere, an issue was directed, which shows that it was considered as a matter of evidence to be determined by a jury, and not a mere matter of law resulting from the words of the decree by which the custom was established. The *837] appeal to the house of lords was against a decree in the duchy court of Lancaster, that an issue should be tried, and that decree was there affirmed. That case is not, therefore, any authority for this defendant, nor does it overrule *Cort v. Birkbeck*, which is directly in point for the plaintiffs.

ABBOTT, C. J. In this case the plaintiffs have alleged and proved an immemorial custom, binding the tenants and residents within the manor of Selby, to grind at the lord's mill, "all their corn and grain which they use in a ground state in their respective dwellings within the manor;" and they complain that the defendant procured corn to be ground at other mills, for the purpose of exposing the same to sale, and selling it in a ground state within the manor to the tenants and residents, to be by them expended in their respective dwellings. Now, the plaintiffs cannot maintain an action against the defendant for that which he is alleged to have done, unless the custom as stated in the declaration and established by evidence, draws with it a further obligation upon the tenants and residents within the manor, not to use any meal or flour in their houses except that which is produced from corn ground at the lord's mill. And therefore, the first and material question is, whether the custom as alleged does draw with it that further obligation? Notwithstanding the observations which have been strongly urged respecting *Ord v. Buck*, I think that case is precisely in point. The custom alleged and proved there, was in substance the same as in the present case; and it was further urged there, as here, that the custom *838] obliged the tenants and residents not only to grind *their* corn at the lord's mill, but to use no corn ground elsewhere. It has been argued, that an issue was there directed on account of the evidence of usage given by the defendants. But upon an attentive consideration, I do not think that assertion correct. It seems to me that those who then had to contend for the further obligation, contended for it, not as a question of fact, but as a consequence of the custom established by the decree in 1664. For I find the first reason of the appellants in these words: "There is no fact in dispute between the parties to be tried by a jury. The custom contended for by the appellants, and stated in their information and bill, is not denied, but is admitted by the defendants in their answer; and the only point is a question of construction, viz., Whether the practice of buying meal and flour ready ground at foreign mills, to be used and consumed by the respondents in their dwelling-houses at Leeds, is not a practice inconsistent with and utterly subversive of the right of the appellants, and the custom established by the decree of 1664; a question which ought to be decided by the court and not by a jury." The reasons for which

the judges who sat in the duchy court directed an issue are not stated ; but from the whole case it is evident, that the plaintiffs put the case there, not as a question of fact depending upon evidence, but upon the ground, that the custom as established by the former decree drew after it the further obligation before mentioned. That being so, I take it, that the directing an issue to try the question as a matter of fact, was in substance directing an issue to try the extent of the custom which had prevailed, and was not by any means an admission, that the custom as before *proved would draw after it, as a consequence of law, that obligation which is now contended for. If that had followed, the [*839 issue would have been unnecessary ; and therefore the house of lords having confirmed the decree which directed the trial of an issue, in effect decided that such a consequence would not follow from such a custom. A contrary decision would have been somewhat extraordinary ; for it is one thing to say, that tenants and resiants shall have their corn ground at the lord's mill ; and a very different one to say, that they shall be debarred from purchasing flour produced from corn ground elsewhere. Looking back to the very ancient times when such customs arose, it may be presumed that the greater part of the tenants and resiants within the manor at that time grew their own corn, and even then it would have been extremely inconvenient if any one who did not grow it, could not lawfully have purchased flour elsewhere. The increase of population and the alteration of manners would make the mischief of such a restriction in these times incalculable. For these reasons, I think that the plaintiffs are not entitled to maintain this action, and that a verdict must be entered for the defendant. The case of *Cort v. Birkbeck* would have been entitled to much more weight had it come before the court in a shape less embarrassing to those who resisted the custom.

BAYLEY, J. I am of the same opinion. Customs are to be construed strictly. Now the custom alleged in this declaration is, that "the tenants and resiants shall grind all *their* corn and grain at the lord's mill." That could only attach upon persons having corn in a *grindable state. In *Cort v. Birkbeck*, [*840 the person who framed the pleadings appears to have thought it difficult to contend upon such a custom without negative words, that the tenants could not buy flour ground elsewhere, and therefore in the first count he alleged that "the tenants were bound not to use corn ground elsewhere than at the lord's mill." Upon the demurrer, the only question was, whether any count in the declaration was proved by the decree given in evidence. Lord MANSFIELD certainly seems to have thought that it proved the first count, containing the negative words. His reasons would not have led me to the same conclusion ; and it is somewhat remarkable that the verdict was ultimately entered on a count which omitted that allegation. *Ord v. Buck* goes, I think, the whole length of deciding this case. The decree there, was similar to that produced by the present plaintiffs. If it had extended to prevent the use of corn ground elsewhere than at the lord's mill, there would not have been any question of fact to try. And, therefore, when the house of lords affirmed the decree directing an issue, they in effect decided that the custom, as proved by the decree, did not go to that extent. It appears to me very doubtful whether a custom to the extent now contended for would not be unreasonable, and bad in law ; but, at all events, the evidence did not prove a custom to that extent, and therefore the plaintiffs cannot have a verdict entered in their favour.

HOLROYD, J. I entirely concur in this case. The custom alleged in the declaration is very different from a custom which would prevent the tenants from using in a ground state corn not ground at the lord's mill. *The [*841 one only prohibits them from getting their corn ground elsewhere ; the other would prevent them from using corn ground elsewhere, whether they ever had it in a grindable state or not. The form of the declaration in *Cort v. Birkbeck* shows it to have been the opinion of counsel in that case, that the latter

custom was more extensive than the former; and *Ord v. Buck* is decisive of the point. There the custom, without the negative part of it, was admitted, and an issue was directed to try that part. If it had followed as a consequence of law from the custom as admitted, the issue would have been wholly unnecessary. The verdict must therefore be entered for the defendant.

Postea to the defendant.

RICHARDSON and Another v. CAPES.

Where the lord of a manor had two mills, and the tenants and residents were, by custom, bound to grind all their malt, which they used in their dwellings, at the said mills, but might take it to either at their own option: *Held*, that the lord, having pulled down one of the mills, had thereby suspended the custom.

This was an action upon the case, brought pursuant to an order made by the vice-chancellor.

The declaration in one count stated the plaintiffs' possession of a mill, with the appurtenances within the manor or lordship and town of Selby, and that by reason thereof they were entitled to the toll of all the malt ground in their said mill; and that all the tenants, residents, inhabitants, and dwellers of and within the said manor of Selby, during all the time of said plaintiffs' possession of the said mill, with the appurtenances, ought to have ground, and still of right ought *842] to grind at the said mill, all the malt which, after the grinding thereof *had been, or should be, expended or consumed in a ground state, in their several messuages or dwelling-houses, situate within the manor, &c. of Selby, and to have paid and yielded, and to pay and yield to the said plaintiffs for the grinding thereof certain ancient and customary tolls. To this declaration the defendant pleaded not guilty. At the trial before BAYLEY, J., at the York Lent assizes, in 1820, the jury found a verdict for the plaintiffs, with 1s. damages, subject to the opinion of this court on the following case.

The plaintiffs, at the time of committing the grievances alleged in the declaration, were in possession of the mill hereinafter particularly described, as the lessees thereof, under the lord of the manor of Selby. Before the alterations hereinafter mentioned, there were two ancient water corn-mills, called Selby Mills, and one ancient horse-mill, belonging to the lord of the manor of Selby, and situate within the manor or lordship and town of Selby. Between fifty and sixty years since the two water-mills were pulled down, and one water corn-mill was erected instead thereof upon their site, having a wind corn-mill over the same. About the year 1806 the streams of water by which the water corn-mill had been worked were diverted from the said mill, under the authority of the act of parliament in the manner hereinafter mentioned, and the said water corn-mill has ever since been, and still is, worked by steam instead of water.

From time immemorial there had been an ancient custom within the manor of Selby, that all and singular the tenants, residents, inhabitants, and dwellers of and within the said town and manor of Selby used and were *843] accustomed, and of right ought, to grind all their corn, grain, and malt, as well growing within the said manor as brought from other places, and spent ground in their houses within the said manor, at the said ancient mills of the lord, or one of them, paying a certain toll, or mulcture, for the same, and this custom still continues to exist within the said manor, and to be applicable to the present mill, unless the alteration of the mill, as before described, or any other circumstance stated in this case, shall be deemed to have extinguished, or suspended, or destroyed the said custom. (The case then set out the act of parliament, and the award of the commissioners as in the former case.) The horse-mill was situated in a place called the Abbey Kiln, at about 500 yards distance

from the water corn-mills. It contained one pair of stones, used for the purpose of grinding malt only : the malt was sometimes brought by the tenants of the manor to the water-mills, and sometimes to the malt-mill to be ground, and sometimes was fetched by the tenant of the mill, but it was more usual to take it to the water-mills. It was more convenient to some of the inhabitants of Selby to carry to the horse-mill than to the water-mills. At the water-mills, both corn and malt were ground with the same stones, if the miller thought proper to grind the malt there. There was no dwelling attached to the horse-mill, nor did any body live or sleep there ; the miller kept no person constantly there to receive the malt, but occasionally a person went there from the water-mill, when the miller wanted to grind the malt there, or when notice was given. When no person was there, the inhabitants, taking malt to the horse-mill, could at any time get the *key. About ten years ago, and before the cause [*844 of action, the owner of the mills entirely removed the horse malt-mill, since which time the malt which has been brought to be ground at the Selby mills has been ground at the steam-mill erected as hereinbefore mentioned. The defendant is a resiant and inhabitant of the manor and town of Selby, and from time to time, between the month of April, 1813, and the commencement of this action, and whilst the plaintiffs were so possessed of the said mill as aforesaid, ground, and caused to be ground, at his own mill, in the manor or town of Selby, fifty quarters of malt, which malt was so ground in order that the same might be, and the same was accordingly manufactured into ale, beer, or other malt liquor, the principal part of which malt liquor was sold to divers persons, resiants, and inhabitants within the said manor, and a small part thereof was spent and consumed by him in his dwelling-house, within the said manor and town of Selby.

The learned judge was about to leave the question to the jury, whether the inhabitants had the option of carrying their malt to the horse-mill, or water-mills, stating his own impression that they had, and if they had, that the custom was extinguished or suspended ; but by consent of the parties it was agreed, that the facts should be stated in the form of a special case for the opinion of the court of K. B. whether, upon the whole, such direction of the learned judge was right, and whether the jury ought to have found accordingly ; the court being at liberty to draw any inference they think a jury ought to have drawn, and to direct the verdict to be entered for either party.

**Tindal* for the plaintiffs. The question in this case is, whether the right of the lord is extinguished or suspended by removing the horse- [*845 mill. It is not extinguished, for it is only ten years since the horse-mill was taken away, and the lord may restore it. With respect to the suspension, it may be admitted, that if there had been evidence of any inconvenience sustained by the defendant, or that the lord was unable to grind the malt at the steam-mill, that would have been an answer to the action ; but nothing of that kind is stated in the case. It is merely said that some of the inhabitants found it more convenient to carry their malt to the horse-mill, not that the defendant found it so, and therefore the contrary must be presumed. But upon the facts, it does not appear to have been any part of the custom that the malt should be ground at the horse-mill. It was for the convenience of the miller, and he ground at either one or the other indifferently.

Parke contra. It is clear that the inhabitants had the option of carrying their malt to either mill, and, therefore, by taking away one of them, the lord has, at all events, suspended the custom, which is a sufficient answer to this action. It has been said, that it was not more convenient to *all* the inhabitants to carry malt to the horse-mill. But the custom is alleged as binding upon *all*, and if any are excepted the plaintiffs have not established their declaration ; besides, the custom is not properly alleged. It is stated that the plaintiffs were possessed

of a mill, and that the inhabitants were bound to grind at the said mill. It appears that in fact there were two mills, and that the resiants might, *at all events, grind at either of them; the custom should, therefore, have been alleged in the alternative, as in *Coryton v. Lithebye*, 2 Saund. 112. There is also another objection, that the custom stated is for the inhabitants to grind all the malt used in their dwellings, and the proof was of a custom to grind all their malt; the same argument that prevailed in *Richardson v. Walker* may therefore be urged in this case.

ABBOTT, C. J. I should have inferred from the evidence in this case, that the resiants within the manor of Selby had an option of carrying their malt to be ground either at the horse-mill or the water-mills. I cannot suppose that such an option would be exercised capriciously, but that each person would exercise it according to his convenience in point of situation, or with a view to his accommodation in point of time. I think that the lord had no right to take away that option. It is admitted by the counsel for the plaintiffs, that if any individual thereby sustains any inconvenience, he is exonerated from the obligation: but then the custom is separated and broken. Originally it was obligatory upon all the resiants; that would make it obligatory upon a part only; and in each case there would be a question, whether the individual had or had not sustained any inconvenience. That would unavoidably give rise to a great deal of vexation and litigation, which the lord has no right to bring upon the resiants. I am, therefore, of opinion, that he has, for the time, suspended the custom altogether. *847] It is not necessary to say that he has extinguished it, and I am unwilling to prejudge that question, which may be tried if the lord thinks fit to rebuild the horse-mill. But as the custom is suspended, he cannot recover in this action, and a verdict must be entered for the defendant.

Postea to the defendant.

The KING v. The Parish of AMPTHILL in the County of BEDFORD.

A. hired a house for 10l. a year, and put into it his furniture, worth above 15l., and lived in it above a year. Having applied for relief, the parish officers were compelled by a magistrate's order to grant it. After the relief was granted, the landlord demanded his rent, but allowed A. a fortnight's time to pay it. Before that time expired, and before the rent was paid, the pauper was removed to another parish by an order of two justices. After he had been removed, he sold his furniture, and paid the year's rent: Held, first, that the parish officers having been compelled to grant relief, A. had thereby become actually chargeable, and was therefore removable by statute 35 G. 3, c. 101, although he had resided above forty days on the tenement.

Held, secondly, that at the time when the order of removal was made, he had not gained any settlement in the removing parish, because he had not then paid a year's rent, as required by the 59 G. 3, c. 50.

Upon appeal, against an order of two justices, made on the 5th day of August, 1823, for the removal of J. Apsley, with his wife and children, from the parish of St. Botolph, in the town and county of Cambridge, to the parish of Ampthill, in the county of Bedford; the sessions confirmed the order, subject to the opinion of this court, on the following case:

The pauper, a ropemaker, being previously settled by estate in the parish of Ampthill, came with his family, at Midsummer, 1822, to reside in a house, in the parish of St. Botolph; he had hired it of one Mitchell, for 10l. a year; he put his own furniture into it, worth 15l. or 16l.; he continued to live in it *848] above a year, and in July, 1823, being much distressed, he applied to the parish officer of St. Botolph for relief, who refused to give him any, but afterwards, in obedience to the order of a magistrate, gave the pauper 14s., on the 31st of July. The day after this relief was given Mitchell called for his rent of 10l., but gave the pauper a fortnight to pay it. On the 5th of August the pauper and his family were removed to Ampthill. He then applied to one Furze, an auctioneer, to buy his furniture, to enable him to pay

his rent. Furze went to Cambridge, valued it at 13*l.* 8*s.* (exclusive of his tools, which were worth 5*l.*) and agreed to buy them for 10*l.*, which sum he paid to the pauper, who kept the key of the house all the time, and returned to it about the 14th of August, on which day Mitchell had sent a person to distrain for the rent, but no distress was taken, because the bailiffs, Furze, and the pauper went together to Mitchell, and the rent was paid by the pauper with the 10*l.* he received from Furze. Another auctioneer had been employed to sell some of the furniture, under the direction and according to the inventory of Furze, and sold it for 3*l.* 13*s.*, and after this sale the remainder of the furniture and the tools might be worth 6*l.*; without the tools the remaining furniture might be worth 1*l.* The sessions decided that the house was not of the annual value of 10*l.*

Storks, in support of the order of sessions. The pauper had not gained any settlement at the time when the order of removal was made, because at that time he had not paid one year's rent. The payment of the year's rent is, by the 59 G. 3, c. 50, made a condition *precedent to the gaining of a settlement. The only question is, had the pauper become actually charge- [*849] able when he was removed? If he was, then he was properly removed by statute 35 G. 3, c. 101, although he had resided about forty days upon the tenement. Now here, the parish officers were compelled, by the order of a magistrate, to relieve the pauper. The latter, therefore, had become actually chargeable.

Nolan. The pauper was not removable from the parish of St. Botolph, even if he had not gained a settlement there, because at the time when the order was made, he had been residing more than forty days upon a tenement of the annual value of 10*l.* Secondly, under the circumstances stated in the case, the pauper had acquired a settlement in that parish. By the ancient law a party was irremovable, unless he came into the parish in a state of vagrancy. The stat. 13 & 14 Car. 2, c. 12, did not enable the incomer to acquire a settlement, but gave the justices power to remove any person within forty days after he shall come to settle in any tenement, under the yearly value of 10*l.* Its object was, rather to prevent a settlement than to confer one. The subsequent statutes 1 Jac. 2, c. 17, and 3 W. & M. c. 11, regulated the forty days continuance in a parish, in terms no further than as it was necessary "to make a settlement." They only prolong the power of removal beyond the original forty days, in cases where the party would have been removed antecedent to 13 & 14 Car. 2. Hence it followed, that a person might be irremovable from a parish where he could not gain a settlement. *Rex v. Leeds*, Burr. S. C. 524, and *Rex v. Martley*, 5 East, 40, are grounded *upon this principle, and show, that a pauper residing either upon a leasehold tenement [*850] or his own estate, may be irremovable, although his residence does not confer a settlement. It is true, that the 13 & 14 Car. 2, in rendering persons removable, refers to the value of the tenement; and in this case the sessions have found the annual value to be less than 10*l.* But statutes which interfere with the subject's common right of choosing his place of residence, by such an arbitrary power as that of removal, are to be construed strictly, so far as they restrain an Englishman's birthright, and liberally, so far as they protect it. The 59 G. 3, c. 50, makes necessary to the acquisition of settlement a bonâ fide taking at a rent of 10*l.*, and payment of that rent, without reference to the actual value. If the justices can investigate the value in opposition to the rent paid, where there is no fraud, it will defeat the object of the statute, and reintroduce that uncertainty and litigation which it was designed to avoid. To avoid these evils, the legislature referred to the rent paid, as the fair and conclusive criterion of the value of the premises. The finding, therefore, by the sessions, that the rent exceeded the real value, was irrelevant and impertinent, and being repugnant to their material finding, as to the bonâ fide payment of rent, is to be dismissed from

the court's consideration. The pauper resided on a tenement of the annual value of 10*l.* within the meaning of the 59 G. 3, c. 50, and was irremovable. He dwelt there, not in a state of vagrancy, but under the protection of a residence, by the progression of which he might finally become settled. He had resided much more than forty days irremovable, and came neither within the letter nor the spirit *851] of the 13 & 14 Car. 2. It may also be urged, that he was not actually chargeable, for it is found that he had property more than sufficient to pay his rent, and maintain him at the time when he received relief. Secondly, he gained a settlement in the parish of St. Botolph; for though, at the time when the order was made, he had not actually paid the rent, yet the landlord having afterwards given him time, and it being in fact paid within the time allowed him, it must be considered as virtually paid at the time when it became due, upon the principle that *omnis rati habitio retro trahitur, et mandato equiparatur*. He had an inchoate right to a settlement, which was afterwards perfected. Any other construction would destroy this species of settlement. It could not be intended, that to perfect the settlement the rent must be paid the instant it becomes due. This seldom happens. Suppose the landlord unwell, or absent, or dead, and his personal representative unknown, it would be unjust to hold that a tenant able and willing to pay his rent, should be deprived of his settlement by any casualty in which he had no participation; and it seems more absurd to say that the landlord, by voluntary forbearance, when neither the landlord nor tenant did or could complain of neglect or omission, the latter was to sustain the same injurious consequence.

BAYLEY, J. It is unnecessary to decide in this case whether, since the passing of the 59 G. 3, c. 50, a settlement is gained by residing on a tenement, for which an annual rent of 10*l.* is payable, but the annual value of which is less.

But inasmuch as the earlier statutes *852] required that the tenement should be of the annual value of 10*l.*, I am inclined to think that the 59 G. 3, c. 50, has not, by requiring that a rent of 10*l.* shall be paid, rendered the actual value immaterial. Without pronouncing any decision upon that point, I am of opinion, that at the time when this order was made, (and the date of the order is very material,) the pauper was removable, and that he had not then gained any settlement in the parish of St. Botolph. It is said, that although he had in fact received relief from that parish, yet as he possessed property, he was not actually chargeable. But I think, that as the parish did not act fraudulently, and as they were compelled to grant him relief by an order of justices, the pauper is to be deemed as actually chargeable, and if so, then he was removable, under 35 G. 3, c. 101, although he had resided on the tenement more than forty days. It is material to consider the history of the law with respect to this power of removal. By the 13 & 14 Car. 2, c. 12, s. 1, upon complaint made to any justice of the peace, within forty days after any person comes to settle in any tenement under the yearly value of 10*l.*, any two justices of the division where any person that is likely to be chargeable to the parish shall come to inhabit, are authorized to remove such person to such parish, where he was last legally settled. Under that statute, complaint must be made to a justice within forty days after the party has come to reside in the parish. The 35 G. 3, c. 101, recites this act, and repeals so much of it as enables justices to remove persons likely to be chargeable, and enacts, that "no person shall be removed from the parish where he shall be inhabiting, to the place of *853] his last legal settlement, until such person shall have become actually chargeable to the parish in which he shall then inhabit;" and then two justices are empowered to remove such person in the same manner and subject to the same appeal, and with the same powers as might have been done before the passing of that act, with respect to persons likely to become chargeable. Now taking these two statutes together, I think the meaning of them is, that the statute of the 35 G. 3, c. 101, takes away altogether the power of removing,

within forty days, persons likely to become chargeable, but gives the power to remove persons actually chargeable, at any time after they have become so, and before they have actually gained a settlement in the removing parish. I am of opinion, also, that on the 5th August, 1823, when the order of removal was made, the pauper had not acquired any settlement in the parish of St. Botolph. The statute of the 59 G. 3, c. 50, introduces new provisions with respect to the gaining of a settlement by renting a tenement. Before that statute any person renting a tenement of the annual value of 10*l.*, and residing on it forty days, obtained a settlement; but that statute enacts, that no person shall acquire a settlement by reason of dwelling for forty days, in any tenement rented by such person, unless such tenement shall be bonâ fide hired by such person, at and for the sum of 10*l.* a year at the least, for the term of one whole year, nor unless it shall be held, and the rent for the same actually paid, for the term of one whole year at the least, by the person hiring the same." Now in this case the pauper took the tenement at Midsummer, 1822, for one year; the year expired, and the rent became due and *payable at the expiration of that time; and if the pauper had made a legal tender of the rent upon the [*854 premises before sunset or the last hour of the day when it became due, and had been able to show that he was always afterwards ready to pay it, possibly such a tender might have been considered in point of law as equivalent to payment. But in this case he had neither paid the rent nor done any thing which, in point of law, can be considered as payment, at the time when the order of removal was made. He had not done what was requisite, in order to give him a settlement, by the renting of a tenement, according to the provisions of the 59 G. 3, c. 50. The order of removal, then, was a valid order at the time when it was made, and the subsequent payment of the rent cannot affect it. I am, therefore, of opinion, that in this case, the pauper, by having applied for relief from the parish in July, 1823, and having received that relief under an order of magistrates, was then actually chargeable, and therefore removable, under the 35 G. 3, c. 101. And I am also of opinion, that at the time when the order of removal was made, he had not acquired any settlement in the parish of St. Botolph, because he had then neither paid a year's rent, nor done any act which, in point of law, can be considered as equivalent to payment.

HOLROYD, J. I also think, that this order of removal is valid. A party, in order to gain a settlement, by renting a tenement, is required, by the 59 G. 3, c. 50, to do certain things which were not requisite before. One of the things required is, that there should be a payment of one year's rent by the tenant to the *landlord. Here the year's rent had become due and payable at Midsum- [*855 mer, and on the first of August the landlord gives the pauper a fortnight's time to pay it, and before it is actually paid, and before the pauper had done any act which the law considers equivalent to payment, the order of removal was made. At that time, then, the pauper had not gained any settlement in the parish of St. Botolph. It is therefore unnecessary to consider, whether the finding of the justices that the annual value of the tenement was less than 10*l.*, is material or not. I am of opinion, that the subsequent payment of rent does not, by retrospective operation, give the party a settlement in the parish of St. Botolph, at the time when the order of removal was made. I fully agree with my brother BAYLEY, that since the 35 G. 3, c. 101, it is not necessary to remove paupers actually chargeable, within forty days after they have come to settle, but that they may be removed at any time after they have become so chargeable.

LITLEDALE, J. It is unnecessary in this case to decide the question, whether, in opposition to the contract of the parties, any other value than the rent actually payable can be set up, because since the statute of the 59 G. 3, c. 50, no settlement can be gained until a year's rent is actually paid. Now in this case the order of removal was made on the 5th of August, and the year's rent

was not paid until the 14th. The subsequent payment of the rent cannot, by retrospective operation, give him a settlement at the time when the order of removal was made, and therefore the pauper had not gained any settlement at that time, and having then become actually *chargeable, he was properly removed. The order of sessions must, therefore, be confirmed.

Order of sessions confirmed.

The KING v. JOSEPH SHEARD and Another, Overseers of SOOTHILL.

A notice of appeal against overseers' accounts, stated that the appellant objected to certain specified payments alleged in the accounts to have been made to persons specified by name in the notice: *Held*, that the notice was bad because it did not state the cause and ground of appeal as required by 41 G. 3, c. 23, s. 4.

The attorneys, some days before the appeal was tried, agreed to admit on the trial of the appeal, that the sums objected to were paid to the persons to whom it was alleged in the accounts that they were paid: *Held*, that this was not any waiver of the irregularity in the notice, because the consent of the attorneys was not signified in open court.

Upon an appeal by John Twigg against the accounts of the overseers of the poor of the township of Soothill from April, 1822, to April, 1823, the counsel for the respondents objected to the sufficiency of the notice given by the appellant; the sessions, however, overruled the objection, and proceeded to hear the merits of the appeal, and struck out certain items in the accounts, subject to the opinion of this court on the following case:

The appellant was a rated inhabitant of the township of Soothill, and having, at the October sessions, 1823, entered an appeal against the accounts of the respondents on the 2d of January, 1824, served the following notice upon the respondents. This notice stated that the appellant, at the last adjourned quarter sessions, had entered his appeal against the accounts of Joseph Sheard and Thomas Tong, overseers of the poor of the township of Soothill, from the month of April, 1822, to the month of April, 1823, and that the appellant would object to thirty-five items or charges of payments in the accounts specified in *357] the notice. It then set out the *names of the persons on whose account the payments were made, the sums paid, and, in some instances, the purposes for which they made. It then proceeded to state that the appellant would insist upon the appeal that all these items ought to be struck out of the accounts and disallowed. The counsel for the respondents objected to the hearing of the appeal, on the ground that the particular causes and grounds of appeal against the items contained in the said notice were not specified and stated in the said notice, as directed and required by the statute 41 G. 3, c. 23, s. 4. On the 14th day of January, 1824, the day before the appeal came on to be heard, the attorney for the respondents and the attorney for the appellant entered into the following admissions. "We do agree to admit that all the payments charged in the accounts of the respondents to which the appellant objects, were actually made to or for the use of the several persons to whom the same are charged to have been paid, and that the several sums charged in such accounts to have been paid to three several persons (named in the notice of appeal) respectively, were for debts contracted by the overseers of the poor of the township of Soothill, in one or more years previous to the year in which the respondents were overseers, and were not contracted by the respondents for the service of their current year, and the respondents undertake to produce upon the hearing of the appeal the original accounts, and vouchers regarding the items and sums of money objected to by the appellant. The court of quarter sessions, without expressing any opinion as to the validity of the notice, considered the admissions as a complete waiver of the objection to it, and entered into the merits of the said appeal. The cause *was argued on a *358] former day during these sittings, by Blackburn in support of the order of sessions, and Alderson and Greenwood contrâ. It was contended, first,

that although the 41 G. 3, c. 23, s. 4, required in terms that the notice should specify the particular causes or ground of appeal, it was sufficient to specify the particular items and the parties to whom they were alleged to be paid. The overseer was not bound to explain the ground of particular charges. The party objecting to those charges, therefore, could not be bound to do more than to state generally that he objects to those items. Secondly, that the parties, by entering into admissions, had waived any irregularity, if there were any such in the notice. On the other side, it was contended that the notice was insufficient in not stating the particular cause of appeal. That might have been either that the sums charged were not paid, or that they were illegally paid. They cited *Rex v. The Justices of Oxfordshire*, 1 B. & C. 279. Secondly, that there was no sufficient waiver in this case, because the statute expressly directed that the sessions should not examine into any other causes of appeal than those specified in the notice, unless it were done by the consent of the attorneys signified by them in open court. Here there was no consent in open court.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the court. The statute 41 G. 3, c. 23, requires one of two things, either notice in writing, stating and specifying the particular causes or grounds of appeal; or, secondly, consent by the overseers, to be signified by them or their attorney in open court, that the sessions may proceed, though there has been no proper notice. The notice in *writing is to be signed by the party giving it, or his attorney, and to be [859 left at the place of abode of the officers, and the sessions are not to examine into any other cause or ground of appeal than those which the notice specifies. Two questions therefore arise: Has there been such a notice as the statute requires? Has there been such a waiver? In this case the original notice, which was served eleven days before the commencement of the sessions, merely stated that the appellant would object to thirty-five items or charges of payment, which he specified. On what grounds he would object he did not state. The day after the sessions commenced, being the day before their adjournment day, the attorneys for the appellant and respondents agreed to admit, that all the payments objected to were in fact made, but that three of them were for debts contracted in prior years, not for debts contracted for the service of the year to which the accounts referred, and the respondents agreed to produce the original accounts and vouchers regarding the items objected to. The sessions expressed no opinion as to the notice, but thought these admissions a waiver of all objections to it. As to the waiver, the statute expressly provides that the sessions shall not examine or inquire into any ground of appeal not specified in the notice, with this single exception only, of consent by the overseers, signified by them or their attorney in open court, and we think that the statute has excluded, and intended to exclude, all questions of waiver in any other way, and that as there was no such consent as the statute requires, we cannot enter into the question of any other species of waiver. Then can it be said that this notice states and specifies the particular causes and grounds of appeal? It states only, *that the appellant will object to thirty-five items or charges of [860 payment: but why? It may be because they are false items, that they have not been paid; it may be, because, they ought not to have been paid; it may be, because though paid, and rightly paid, they ought not to be brought in charge against the parish, but ought to be borne personally by the overseers. And where a notice is general, and leaves it uncertain upon which of several possible grounds of objection, an item is questioned, can we say that it states and specifies a particular ground? We think not. Then, will the admissions supply the defect in this notice, not as a waiver, but as making it a good notice in itself. The statute prescribes no form of notice, it specifies no time within which it shall be delivered; and its only object being that the respondents may

know distinctly what objections they are to prepare to meet; and so long as that knowledge is fairly communicated to them in writing, it may be thought, that the mode in which it is communicated is immaterial. But it can never be supposed that the respondent's attorney meant, by entering into these admissions, to waive any other objections, which would otherwise have been open to him; his authority would be to uphold the rights of the respondents, not to give them up; and where the statute requires notice in writing to be left at the place of abode of the persons on whom it is to be served, we think we ought not, except upon very clear grounds, to allow it to be dispensed with.

Order of sessions quashed.

*861]

*CLEMENTI and Others v. WALKER.

An author publishes his work in a foreign country in 1814, and afterwards agrees to sell to A. the exclusive right of printing the same work in this country, but no agreement or consent in writing was then entered into. A. publishes the work in September, 1814, in England. In 1818, B. publishes the same in England. In 1822, the author, by an agreement in writing, assigns to A. the exclusive right of printing the work in England: *Held*, that A. did not, by the parol consent given by the author in 1814, acquire the exclusive right of publishing the work in England; secondly, that that could not be deemed a publication by the author, not being made on his account or for his benefit: thirdly, that the publication by B. in 1818, was a lawful publication: and, fourthly, that the author could not afterwards, in 1822, by making a valid assignment to A., enable him to maintain an action against B. for selling a copy of the same work after such assignment was executed.

CASE. The first count of the declaration stated that the plaintiffs, before and at the time of the committing the grievances thereafter mentioned, were the *proprietors* of the copyright, of and in a certain book being a musical composition, called "Vive Henri Quatre," the celebrated national French air, with an introduction and eight variations for the piano forte, first printed and published within fourteen years last past; to wit, at, &c., Westminster, in the county of Middlesex, yet that the defendant well knowing the premises, but contriving, &c., theretofore and after the passing of a certain act of parliament in the 54 G. 3, to wit, on the 26th day of January, 1822, and on divers other days and times between that day and the day of exhibiting the bill of the said plaintiffs against the defendant, to wit, at, &c., knowingly, wrongfully, and injuriously, and without the consent of the plaintiffs, so being the proprietors of the copyright of and in such book first had and obtained in *writing*, printed and caused to be printed, divers, to wit, 2000 copies of the said book of the plaintiffs, by means whereof the plaintiffs were greatly injured and damnified to wit, at, &c. There were other counts for having published and exposed to sale, the same work, &c. At the trial before ASBOTT, C. J., at the Middlesex sittings in

*862] *Hilary term, a verdict was found for the plaintiffs with nominal damages, subject to the opinion of this court on the following case:

Mr. F. Kalkbrenner, a foreigner, composed the music in question, in France, in the summer of 1814. Before he came to England, which he did in June in that year, he agreed with Mr. Pleyel, a publisher of music in Paris, that he should have the right of publishing such music in France only, reserving to himself the right of publication in England. It was not published in France before Mr. Kalkbrenner quitted that country to come to England. On the 17th of June, 1814, there were deposited by Mr. Pleyel, five copies of the musical composition in question, in the *dépôt* at Paris for entry of copyright in France. It has been published and sold in France up to the present time. Shortly after Kalkbrenner arrived in England, viz., on the 12th of July, 1814, he sold the work in question with two others by a *parol* agreement for the sum of 30*l.* to the plaintiffs, and two other partners since dead, and which sum was then paid to him for the same. A few days after such sale Kalkbrenner returned to France, and then corrected the engraving of the composition for the publication in Paris for Mr. Pleyel, and did not see the work published at Paris till the

following year, 1815. The plaintiffs first published the composition in England between the 3d and 10th of September, 1814. At the distance of two years after this, Kalkbrenner was paid by Mr. Pleyel 300 francs, which is equal to about 8*l.* sterling, for the right Kalkbrenner had so sold to him. On the 24th of January, 1822, Kalkbrenner being in England, executed an assignment in writing of his copyright in the musical composition in question to the plaintiffs, agreeably to the terms of *sale made by him to them in 1814. [863] The defendant sold a copy of the work in question to Mr. Lindsey on the 20th of February, 1822, at his shop in London, for two shillings. Such copy was on English paper and from an English engraving. The son of the defendant, in 1818, purchased a copy of the composition published by Pleyel at a shop in France, with a number of others by the same author, which the defendant caused to be engraved and published in England, in December, 1818. The defendant's edition was a fac-simile of the copy so purchased by his son, and there was no difference between that edition and the edition published and sold by the plaintiffs in England. There is a register kept at Paris, and by the law of France all musical publications must be registered, and a copy of the said composition was duly registered and deposited there the 17th of June, 1814. The defendant's son never heard or saw the composition until he saw it at the shop in Paris in 1818. This case was argued on a former day at these sittings, by *Comyn* for the plaintiffs, and *Campbell* for the defendant.

For the plaintiffs, it was insisted that they, as the proprietors of the copyright were entitled to recover. The statute 8 Anne, c. 19, gave the sole right of printing any book to the author or his assignee for fourteen years, to commence from the day of his first publishing the same. That statute is explained by the subsequent statutes of the 41 G. 3, c. 107, and the 54 G. 3, c. 156. They were all passed to secure the rights of authors, and ought to be construed most favourably for them. The publication of the work by the plaintiffs in September, 1814, did not confer upon them the exclusive right of printing the same, because there was no consent of *the author in writing as required by the statute, [864] *Power v. Walker*, 3 M. & S. 7. But that publication having been made with the sanction of the author, is to be deemed a publication by him at that time, and a subsequent printing of the same work by the defendant was a wrongful publication of it. The right vested in the author in 1814, and continued in the author until he executed a valid assignment of it to the plaintiffs in 1822; and there being a sale of a copy of the work after that period by the defendant, a good right of action thereby accrued to the plaintiffs.

For the defendant, it was contended that there having been a previous publication of the work in a foreign country by the assent of the author, he could not afterwards claim the exclusive right of publishing it in this country. It was true, that in *Edgeberry v. Stephens*, 2 Salk. 447, a patent for a thing practised beyond seas was held good, but that case turned upon the words of the statute, 21 Jac. 1, c. 3, s. 5, which authorized the granting of patents, for the working of any new manufacture, to the first and true inventor. By the statute of Anne, the exclusive right is given to the author for a term to commence from the time of his first publishing the same. All the statutes upon this subject contemplate a work published for the first time in England. The provisions in the 8 Anne, c. 19, s. 2, requiring the copy of all books thereafter to be published to be entered at Stationers' Hall, and copies to be delivered there, as well as the clauses giving power to the archbishop of Canterbury and other great officers of state to settle the prices of *books, all show that the legislature contemplated [865] a work published for the first time in England. Sec. 7 enacts, that the act shall not extend to prevent the importation of any book printed in Greek, Latin, or any other language beyond the seas. From that section it appears, that any book already printed beyond the seas may be imported and sold here, and if that be so, why should it not be reprinted here? The reprinting would

give employment to British industry and capital. The 12 G. 2, c. 36, prohibits the importation of books originally composed and printed here and afterwards reprinted abroad, but it does not prohibit the importation of books published abroad in the first instance. The author in this case, by once publishing his work in France, dedicated it to the public, and cannot afterwards claim an exclusive copyright in this country. Suppose the work had been published abroad for fifty years, and some person had reprinted it here, surely the author after such a lapse of time could not for the first time claim the work, reprint it, and then bring an action against the party who had reprinted it here. The plaintiffs acquired no right until 1822. The defendant had before that time published the work here. That was a lawful publication, for he might at that time have imported any number of copies printed in France. Having once published, it was not competent to the author after such a lapse of time to claim the exclusive right of publishing in this country

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the court, and after stating the facts of the case, proceeded as follows:

*866] "The first question in this case is, whether the publishing of the work, in September, 1814, gave to the plaintiffs the privileges conferred upon authors by the legislature, and we are of opinion that it did not, because there was not any assignment or consent in writing given by the author previously to that publication. The case of *Power v. Walker* is an authority to show that a parol assignment is not sufficient to give to the assignee the privileges conferred by the legislature upon the author. We are also of opinion that Kalkbrenner did not thereby acquire the exclusive privilege of printing, because it was not printed upon his account, nor was it done with a view of conferring any privilege upon himself. The next question is, whether the publication by the defendant, in 1818, was a wrongful publication, so that the author, or any person claiming under him, might put a stop to it? And that question depends upon two points; first, whether the protection and exclusive privilege given by the statute of Anne, and subsequent statutes, extends to cases where the author prints and publishes abroad *only*, without ever publishing in this country; and, secondly, whether it extends to cases where he is the first who publishes abroad, and afterwards is publisher here, but not until after a reasonable time for his publishing here has elapsed, and after some other person, without any fraud, and in the regular and fair course of trade, has published the work in this country. The different statutes which give protection to authors, do not give it as to all books, but as to printed books only. The 8 Ann, c. 19, begins by reciting, that printers had of late frequently printed books and other writings, without consent of the authors, to their detriment, and too often to the ruin of *them and their families, and to prevent such practices, and for *867] the better encouragement of learned men to write useful books, it enacts, that the authors or purchasers of the copyright of books already printed shall have the sole right of printing such books for twenty-one years, and the authors of books not then published, or thereafter to be composed, should have the sole right of printing for fourteen years, and if any other person should print, reprint, or import, without consent from the proprietors, signed in the presence of two witnesses, or knowing of its having been so printed, should sell, without consent, he should pay a penalty. By section 2, no person shall be subject to these forfeitures for printing or reprinting unless the title of any book *thereafter to be published* shall, before such publication (i. e. before it is published by the author) *be entered in the register book of the company, at Stationers' Hall*. By section 5, nine copies of each book that shall be printed and published as aforesaid, shall be delivered to the warehouse-keeper of the company at *Stationers' Hall, before such publication made*, for the use of the royal library, and the libraries of Oxford, Cambridge, the Scotch universities,

Sion College, and the Advocates' Library, in Edinburgh, on pain of forfeiting 5*l.* for every copy, besides the value of the copy, and if the penalties are incurred in Scotland they shall be recovered in the court of session. By section 7, this shall not prohibit the importation, vending or selling of books in any foreign language, printed beyond seas. The statute of Anne, therefore, not only gives protection to authors as to books *thereafter* to be published, but to books *previously* printed, but the British legislature must be supposed to have legislated with a view to British interests and *the advancement of British learning. By confining the privilege to British printing, British capital, [*868 workmen, and materials would be employed, and the work would be within the reach of the British public. By extending the privilege to foreign printing, the employment of British capital, workmen, and materials might be suspended, and the work might never find its way to the British public. Without very clear words, therefore, to show an intention to extend the privilege to foreign publications, I should think it must be confined to books printed in this kingdom, and instead of there being any such clear words to show that intention, there are provisions which strongly imply the latter. The provisions directing that the authors of books *generally* shall have the sole right of printing and reprinting, and that before publication the title shall be entered, and copies delivered at Stationers' Hall, evidently contemplate a British, not a foreign publication. The 12 G. 2, c. 36, which prohibits the importation of books reprinted abroad, and first composed and printed in Great Britain, evidently considers the statute of Anne as confined to books printed here. The 41 G. 3, c. 107, contains provisions similar to those in the 8 Anne and 12 G. 2, and extends those privileges to works published in Ireland and other places, so as to prevent the pirating of British works in any of the British dominions in Europe. But it has no provisions particularly bearing on the present question. By the 54 G. 3, c. 156, the provision for delivering copies at Stationers' Hall, is repeated, and it is provided, that on demand made in writing, at the place of abode of the publisher, within twelve months after the publication thereof, eleven copies shall be delivered at Stationers' Hall, under a *penalty [*869 of 5*l.* for each copy not delivered, and the value, so that it clearly contemplates that the publisher must have a residence within this kingdom, and evidently looks not to a foreign but to a home publication. This last statute introduces, for the first time, after the word *composed*, the additional words "printed and published," and therefore explains what might have been understood from the former provisions. Upon this view of the several statutes it appears to me that the legislature contemplate publications here and here only, and that they contemplate such publications only when they are made by the author, or under such consent and authority from him as the statutes require, and that they contemplate such publications only when they are capable of advancing literature here, viz., before the work is published here, by a person who has obtained it fairly and bonâ fide, under a previous publication, by the author in a foreign country. Now, here the work was composed before June, 1814. In that month the author sanctioned a publication of it in France, and five copies of it were deposited in a musical dépôt at Paris. In July, 1814, the author made a verbal arrangement with the plaintiff, and he published in the September following; but the publication was not a publication by the author, so as to entitle him to the statutory privilege, nor was it such a publication as would secure the right to the plaintiff, because it had not such authority or consent from the author as the statutes required. It was then an unprotected publication, and not a publication which would give an exclusive right, or preclude any other from publishing. Whilst things remained in this state the defendant published, viz., in 1818. The plaintiff had nothing to give him the semblance of a valid right 'till January, 1822, and the question is whether the subsequent assent of the author gave the plaintiff a right to put a stop to [*870

the circulation of that work. The point, whether an author publishing abroad is entitled to the privilege here, if he is the first person who publishes here, does not arise; because before there was any publication in this case which can stand in the place of an author's publication, there was an unauthorized publication by the plaintiff, and an unexceptionable publication by the defendant. The case, therefore, is reduced to this, whether an author who first publishes abroad, and instead of using due diligence to publish here, forbears to publish until some other person, fairly and without blame, publishes here, can insist upon his privilege, and, at a distance of time, stop a publication which, in the interim, has taken place here, and treat the continuance of that publication as a piracy, and we are of opinion that he cannot. Whether the act of printing and publishing abroad makes the work at once *publici juris* it is not necessary now to decide; but we have no doubt that it becomes *publici juris* if the author does not take prompt measures to publish here. To hold the contrary would discourage British enterprise, and stop the avenues to British knowledge. If the author does not promptly print and publish here, why are the public to be deprived of the benefits of British printing, and British publication? no good or plausible reason can be given for the deprivation. We are, therefore, of opinion, that the publication by the plaintiff, in 1814, was not such a publication as gave any privilege to him, or to Kalkbrenner, that the publication by the defendant, in 1818, was an unexceptionable publication, and that the assignment to the *871] plaintiff, in January, 1822, did not *give him any right to stop the sale of the defendant's publication, and consequently that this action cannot be maintained.

Judgment of nonsuit.

THE KING v. COOKE.

The court will not allow a plea in abatement, to an indictment for a misdemeanor, to be amended. Where a defendant pleads in abatement to an indictment for a misdemeanor that he is a peer, he must state that he is a peer of the United Kingdom, and the mode in which he derives his title.

INDICTMENT for a misdemeanor. Plea, Richard Stafford Cooke, Lord Stafford, Baron Stafford, who is indicted by the name of R. S. Cooke, late of, &c., gent., in his own person comes, and having heard the said indictment read, prays judgment of the said indictment, because he says, that on the day of taking the inquisition aforesaid, and long before, he was and from thence hitherto has been, and still is Lord Stafford, Baron Stafford; and the state, degree, title, and honour of Lord Stafford, Baron Stafford, on the day of taking the inquisition aforesaid, and long before had and enjoyed, and still has and enjoys; and this he is ready to verify; wherefore, &c. Demurrer and joinder. In Easter term, *Campbell* moved for leave to amend the plea.

Per Curiam. This plea merely goes to the description of the defendant, and avoids the merits of the question. Whether it be true or false, the indictment will be tried in the same mode. No instance can be found in which such a permission has been granted. The court will therefore abide by the rule established in civil cases, not to allow a plea in abatement to be amended.

Rule refused.

The demurrer was now argued by *872] *Talfourd*, for the prosecution. The plea is bad on two grounds. First, that it does not appear on the face of it that the defendant claims a peerage of England, or of the United Kingdom. Secondly, it does not set out the mode in which his claim is derived. As to the first point, *Lord Sanchar's* case, 9 Co. 117, decided, that no one is to be accounted a peer of the realm unless he be a lord of parliament. And in 2 Inst. 667, Lord Coke says, "all dukes, marquesses, earls, viscounts, and barons of other nations, or which are

not lords of the parliament of England, are named armigeri, if they be no knights, and if knights, then they are named milites.”(a) In *Rex v. Knollys*, *Ld. Raym.* 10, a plea of this nature was held good without an averment that he was *unus parium regni Angliæ*, but that was on the ground that the letters-patent by which the peerage was created, were set out. Perhaps an act of parliament, 1 Ed. 6, “for the restitution in blood of the Lord Stafford,” may be relied on in support of the plea. But first, that was not a public act, and therefore the court will not take judicial notice of it; and secondly, the peerage now claimed is not the peerage therein mentioned. The act set forth a particular grievance and an individual claim, and was passed to confer a benefit on an individual; it does not even refer to any class of persons, and is, therefore, a private act. *Bull. N. P.* 223. Secondly, the title now claimed is different from that mentioned in the act. That restored the party to the title of Lord Stafford, and enabled him to bear the arms of the barons of Stafford. This defendant claims to be Baron Stafford. But if the first objection were insufficient, the plea is bad, for not showing whether the title is derived by writ, by letters-patent, by descent or prescription. For the *first would be triable by [*872 record, the second by production of the letters-patent, the third and fourth by the country. *Rex v. Knollys*. It is therefore necessary that the plea should show how the title is derived, in order that the prosecutor may know how to take issue upon it.

Campbell, contra. The words of this plea must have a reasonable intendment, and the claim of the defendant must be construed a claim to be a baron of England. It would certainly be difficult to support the plea without the aid of the act of parliament, 1 Ed. 6. If that be a public act it must be considered as embodied in the plea. By that act Lord Stafford was restored in blood, and it was enacted, that he should have in parliament and other places, the room, name, place, and voice of a baron. And by a subsequent section he is authorized to take the arms of the barons of Stafford. In all judicial proceedings, where a person is described by a title of peerage in England, he must be taken to be a peer of England. The act in question is a public act. All statutes relating to measures of state are public. This act touches the king's prerogative, it also affects one branch of the legislature, and therefore all the peers of the realm. It must, therefore, be considered as a public act, and the court must take judicial notice of it. The peerage is thereby shown to be an English peerage, the origin of it is also shown, and the defendant can only have it by descent. There is not then any difficulty as to the mode of trial, and the plea is good, without expressly averring that he claims by descent.

BAYLEY, J. If the indictment in this case had described the defendant as a peer, still he would not have been entitled to claim any privilege of peerage. The *plea, therefore, is merely a dilatory plea; and pleas in abatement [*874 to a writ or indictment must give a better writ or count, they must be certain in every particular; and therefore, in this case, the defendant was bound to show not only his right to a peerage, but also how he derived that right. The prosecutor would be entitled to take issue as to that, and the mode of trial depends upon the nature of the claim. When a party claims to be a peer by writ, he is not a peer until he has taken his seat; that is to be tried by the record of parliament. If by patent, the title is complete as soon as the patent is sealed. The replication in that case would be non concessit, which would be triable by the patent itself. If the claim were made by descent or prescription, that would be triable by the country. The difference in these several modes of trial shows that the omission to state in what way the defendant claims a peerage, is an objection to the substance, and not merely to the form of the plea. Then is the defect remedied by the act of parliament referred to? In the plea the defendant calls himself Lord Stafford, Baron Stafford; calling a person *lord* does not show

(a) See also 1 Inst. 16 b.

him to be a peer of parliament, *Lovel's* case, cited in the *Countess of Rutland's* case, 6 Co. 54. But it has been argued, that the court must presume that this person is heir male of the person restored to the dignity of Lord Stafford, by that act of parliament. Even if he had been described by the very title there mentioned, he must have averred that he was the heir male: but looking at the act, in order to connect the title now claimed with that which was thereby restored, the court would have to take for granted more than they can, properly, on a plea in abatement. "Lord Stafford" is the "only title created by *875] that act, and it says that he shall be a baron, but does not state by what appellation. Then the privilege of bearing arms is given in terms which raise a presumption, that the old title was "Baron of Stafford," not Baron Stafford, which is the title here claimed. If, therefore, we exclude this act from our consideration, the plea is bad, as not showing how the title is derived. If we take the act into consideration as a public act (upon which point I give no opinion) still in order to make the plea good, it was necessary for the defendant to aver that he was heir male of the person thereby created Lord Stafford. For these reasons there must be judgment of respondent ouster.

Judgment accordingly.

BLAKE v. JOSEPH ATTERSOLL.

The annuity act, 53 G. 3, c. 141, applies only to annuities granted for pecuniary consideration, and therefore, where by marriage settlement 10,000*l.* was to be paid by the father of the wife to trustees upon trust to pay the interest to the husband for life; and the father died without having paid the principal to trustees, and his affairs being embarrassed, and it being uncertain whether there would be sufficient to pay his debts, the husband agreed to accept in lieu of the 10,000*l.*, 5000*l.* and an annuity of 125*l.* payable during his life: it was held, that such annuity granted by the executors of the father did not require to be enrolled by the statute 53 G. 3, c. 141.

DEBT on bond in a penal sum of 2500*l.* conditioned for payment by defendant, and one John Attersoll, deceased, of an annuity of 125*l.* to the plaintiff for life. Breach, non-payment of the arrears of the annuity. Plea, first cravingoyer of the bond and condition. The condition recited a marriage settlement of the plaintiff and the sister of the defendant, and an agreement by Joseph Attersoll, deceased, to secure 10,000*l.* by the assignment of certain dock shares to trustees upon the trusts of the settlement, and the plaintiff was to have the *876] interest of this 10,000*l.* for his life. The condition then recited, that no transfer of the 50 dock shares had ever been made to the trustees; and that the sum of 10,000*l.* had never been raised, and that Joseph Attersoll, the father, died in 1812, and by his will had appointed the defendant and another executors; and that there were various unsettled and doubtful claims and demands against Attersoll the deceased, so that the accounts relative to his estate and effects could not then be adjusted by his executors, and therefore it was not known whether his estate and effects would be sufficient to pay the whole of his debts and engagements, and it was probable that they could not be administered without the aid and assistance of the court of chancery; that it had been proposed, therefore, between the defendant, the trustees of the marriage settlement, and the executors of Attersoll the father, for the immediate and final settlement of all claims upon the said executors, or upon the estate of Attersoll the father, in respect of the sum of 10,000*l.*, that the executors should pay to Blake the plaintiff 5000*l.*, and should, by their joint and several bond, secure to him an annuity of 125*l.*, payable during his life; and it was agreed that that sum of 5000*l.* and the annuity should be in full satisfaction of the sum of 10,000*l.* due and owing from the estate of the father to the trustees, and in consideration thereof, Blake had agreed to secure to the trustees 10,000*l.* by mortgage upon his freehold estates in Ireland; and it was further agreed that the sum of 10,000*l.* should be considered as paid and discharged by the exe-

cutors to the trustees of the marriage settlement, and that the sum of 10,000*l.* and the interest, secured by the mortgage, should be held by them on the trusts of the settlement. It then recited a mortgage deed by Blake, and that he *and the trustees of the marriage settlement had released and discharged [877 the executors from the dock shares and the sum of 10,000*l.*, and from all claims and demands in respect of the marriage settlement. The condition of the bond, then, was for the payment of the annuity by the executors by quarterly payments. The plea then stated, that the bond was made after the 53 G. 3, and that no memorial was enrolled, as required by that act. Another plea was, that at the time of the release, such release and discharge was worth the sum of 50*l.*, and that no memorial was enrolled. To these pleas there was a general demurrer.

Jeremy was to have argued in support of the demurrer; but the court called upon

Stephen contra. There being no memorial of this annuity, it is void by the 53 G. 3, c. 141. It is true, that in *Crespigny v. Wittenhoom*, 4 T. R. 790, it was held that an annuity granted in consideration of the grantee's giving up his business to the grantor, need not be registered under the 17 G. 3, c. 26; but the reasons upon which that decision was founded do not apply to the present case. There it was inferred from the preamble, that the statute was confined to annuities granted for pecuniary considerations. The matters contained in that preamble are not to be found in the 53 G. 3, c. 141. It may fairly be inferred, therefore, that the latter statute was intended to have a wider operation. The second section does not pursue the terms of the former act. It requires the pecuniary consideration for *granting the annuity to be enrolled. From that, it may be inferred that the statute contemplated that there might be some other consideration, and that is made clear by the excepting clause, sect. 10, which enacts that the statute shall not extend to annuities given by will or marriage settlement, or for the advancement of a child, or to any voluntary annuity granted without regard to pecuniary consideration or *money's worth*. It would seem, from this clause, that annuities granted for other than a pecuniary consideration were deemed by the legislature to be within the enacting clause. In the case of *James v. James*, 2 Brod. & B. 702, the court of C. P. were of opinion that the statute applied only to cases where a pecuniary consideration was given for the annuity, but the excepting clause clearly shows that to be incorrect. The object of the enrolment was to give publicity to the transaction, and to prevent any unfairness which was likely to be encouraged by secrecy; and the consideration was required to be stated, in order that it might be seen whether an inadequate consideration was given for the annuity or not. The case of *Morris v. Jones*, 2 B. & C. 232, only shows that collateral securities need not be enrolled. If the court be not bound by authorities, this ought to be held a case within the statute, for the act is in terms very general. The enacting clause is not controlled by any words of restriction, and that is followed by a clause excepting the cases of annuities granted by wills or marriage settlements, and other cases where there is clearly not any pecuniary consideration. The term *money's worth*, in the excepting clause, shews clearly that the enacting clause contemplated considerations not pecuniary. *Even if the decision in *James v. James* be right, still here the [879 consideration for the annuity was money's worth, and not being a voluntary annuity, it is not within the exception; and one of the pleas expressly alleges that the release was of the value of 50*l.*

BAXLEY, J. This case has been put by Mr. Stephen as strongly as it could be; but I am satisfied that the annuity secured by the bond is not an annuity required to be enrolled by the 53 G. 3, c. 141. The 17 G. 3, c. 26, recites that the pernicious practice of raising money by the sale of life annuities had of late years greatly increased, and was promoted by the secrecy with which

such transactions were conducted. The mischief contemplated in the preamble, therefore, was the practice of raising money by the sale of life annuities. Now, although the 53 G. 3, c. 141, has not the same large words in the preamble, yet there is sufficient in the other parts of it to show that the legislature had in view the same object, viz., preventing the sale of life annuities. Thus, sect. 6 enacts that annuities shall be void, in case any part of the consideration for the purchase of such annuity shall be returned, or in case such consideration be paid in notes, if the notes shall not be paid when due, &c. So sect. 8 enacts that all contracts for the purchase of any annuity with any person under age shall be void. The recurrence of the word "purchase" in the several clauses, shows clearly that the legislature intended to proceed on the same principle, and had in view the same object, viz., the restraining of the practice of the sale of life annuities. Then, is this the case of the sale of a life annuity? It appears on the pleadings, that on the marriage of the defendant Blake with the daughter of Attersoll the elder, certain dock shares were agreed to be transferred to trustees, to enable them to raise the sum of 10,000*l.*; that Blake was to have the interest of that sum for his life. Attersoll died, and the dock shares had not been assigned. It appears that Attersoll died in embarrassed circumstances, and that it was uncertain whether his estate would be sufficient to pay his debts. Under these circumstances, it was agreed between Blake and the executors of Attersoll that the latter should pay 5000*l.*, and secure to Blake an annuity of 125*l.* in lieu of 250*l.*, to which he was entitled by his marriage settlement. I am of opinion that this is not the grant of an annuity contemplated by either of these acts of parliament. It is not an annuity bought by the grantee and sold by the grantor. Blake, with a view of relieving the estate, gave up part of the money to which he was entitled by his marriage settlement, and agreed to receive in lieu of it an annual sum, amounting to ten shillings in the pound upon the sum which he was entitled to receive, and the executors covenanted to pay that annual sum to him. The court of King's Bench, in the case of *Crespigny v. Wittenhoom*, have held that the 17 G. 3, c. 26, did not apply to an annuity of this description; and in *Hutton v. Lewis*, 5 T. R. 640, that it did not apply to an annuity granted in consideration of the grantee resigning his situation as master of an academy in favour of the grantor, although at the time of the grant the grantee agreed to assign over to the grantor his household furniture, &c., at an appraised value, and to lend a sum of money to the grantor, to be repaid with interest; and there Lord KENYON says, "This annuity is not granted in consideration of money paid to the grantor, but of resigning the grantee's situation in favour of the grantor. In this case, the grantee of an annuity is the executor of an insolvent estate, out of which there might probably be no surplus. There was no consideration money from the grantee to the grantor. The exception in the 53 G. 3, c. 141, has been very properly commented upon in argument; but I think many of the cases mentioned in that exception, for instance, the case of annuities granted by wills, or marriage settlements, are not within the enacting clause. Sect. 2 requires that the pecuniary consideration shall be enrolled according to a given form set out in the act. In that form in the column headed "consideration, and how paid," are the words "so much paid in money, so much paid in bank notes, or other notes or bills of exchange." It appears clearly, therefore, that that section contemplated a consideration paid in money, or promissory notes or bills of exchange, and construing that section with the tenth, I am of opinion that the legislature intended an annuity bought on the one hand, and sold on the other for a consideration moving from the grantee to the grantor. In this case there was no consideration moving from the grantee to the grantor; but the former gave up his right to a large sum of money to which he was entitled, in consideration of the latter securing him the smaller sum. For these reasons, I am of opinion that our judgment must be for the plaintiff.

HOLROYD, J. I am of the same opinion. The grantee of this annuity gave up the chance of getting the whole sum due to him from the estate of the deceased; and *with a view of avoiding certain inconveniences, if his affairs should not be finally arranged, he agreed to accept a smaller sum [*882 in lieu of the sum actually due to him. There was no money or money's worth paid or given for the annuity, and, therefore, my opinion is, that it is not a case within the statute.

LITTLEDALE, J. I am of opinion that this is not an annuity within either of these acts of parliament. It is said, that because the preamble of the first act is omitted in the second, the object of the two acts is not the same: but both acts are in *pari materia*, and one is substituted in lieu of the other, and it may be collected from the other clauses, that the mischiefs intended to be remedied are the same. The object of the two acts, therefore, being the same, the preamble of the first act may be considered as virtually incorporated in the second, and, therefore, I am clearly of opinion, that to bring a case within the 53 G. 3, c. 141, there must be an actual sale of an annuity for money, bills, or goods. The form of the enrolment given by the second section shows that the consideration must be either money or something which can be converted into money. The clause also regulating the payment of brokerage shows clearly that it must refer to money payments. The annuity in this case was not an annuity granted for a pecuniary consideration or for money's worth, and, therefore, it is not within the act of parliament, and the judgment must be for the plaintiff.

Judgment for the plaintiff.

See *Harrison v. Smitheringale*, 5 B. Moore, 481; *Keats v. Hick*, 5 B. Moore, 629; *Crosley v. Arkwright*, 2 T. R. 603.

*The KING v. The Inhabitants of KNAPTOFT.

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Upon the trial of an appeal at the quarter sessions, the respondent parish proved relief granted to the father of the pauper by the appellant parish before the year 1815. The appellant parish then tendered an order of sessions made in the year 1815, quashing an order of justices for the removal of the brother of the pauper to the appellant parish. And they tendered parol evidence to show that the ground of the decision of the court of quarter sessions was, that the father of the pauper had not at that time any settlement in the appellant parish, and consequently, that the son had not any derivative settlement there: *Held*, that even if parol evidence was admissible to prove the ground of the decision of the sessions, still that the order of sessions was not evidence that the father of the pauper was not settled in the appellant parish in 1815, because the father's settlement was a matter that arose collaterally on the trial of the first appeal.

Upon appeal against an order of two justices, dated the 19th of August, 1823, for the removal of Elizabeth Burdett, single woman, then with child, from the parish of Gumley, in the county of Leicester, to the parish of Knaptoft, in the same county; the sessions confirmed the order, subject to the opinion of this court on the following case:

The respondents, in support of the order, proved that the father of the pauper, while residing in the respondent's parish, had received relief from the parish of Knaptoft, for five years prior to 1815. The parish of Knaptoft, then offered in evidence an order of the court of quarter sessions, upon an appeal in 1815, between the same parishes, respecting the *settlement of a brother of the pauper*, by which an order, adjudging the brother to be settled in the parish of Knaptoft, was quashed. This was objected to by the counsel for the parish of Gumley, and rejected by the court. Another order was then produced; whereby the pauper, Elizabeth Burdett, was removed from Gumley to Mowsley, in 1822, which was afterwards quashed by consent. The appellants then called the chairman of the court in 1815, who proved that his notes of the trial were destroyed, and that he did not remember the evidence. They then called the father of the pauper and asked him whether he was a witness at the trial in

*884] 1815; to this he answered in the affirmative. He was then asked to what facts he was then examined; this was objected to by the counsel for the respondents. The court thought that the question was not relevant and not admissible, and they confirmed the order of removal, subject to the opinion of this court as to the admissibility of the evidence so tendered by the appellants.

Phillips and Humfrey, in support of the order of sessions. In this case, the settlement of the pauper alone was in issue, and the question to be tried was, whether his settlement was in Knaptoft. The order of sessions, made in 1815, was offered in evidence, to show that the settlement of the pauper's brother was not at that time in the parish of Knaptoft. The settlement of the sister, however, is not necessarily the same as that of the brother: they are not dependent on each other, therefore the evidence was irrelevant and immaterial. It is laid down by DR GREY, C. J., in the *Duchess of Kingston's* case, that the judgment of a court of concurrent or exclusive jurisdiction, is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment. With respect to the brother's settlement, the former judgment reversing the order of removal is conclusive between the parties; so that if the respondent parish should again remove him to the appellant parish, it would prove conclusively, that at the date of the judgment the brother's settlement was not in the appellant parish; the same question arising between the same parties, and the same subject-matter being directly in issue. The parol *885] evidence was offered to show that the point adjudicated *by the sessions in 1815 was, that the brother had not a derivative settlement in Knaptoft, or in other words, that his father was not then settled there. That is evidence offered to explain the judgment, viz., to show that the court decided a particular point, which the judgment does not profess to decide. The order of quarter sessions quashing an order of removal is equivalent only to a judgment of nonsuit. It is quite clear, that parol evidence would not be admissible to show what was the point actually in a course of inquiry, where the plaintiff chooses to submit to a nonsuit. There is only one case where the evidence given at a former trial is admissible, viz., when the witness is dead; but even then it is admissible only in a case where the same point is at issue.

Clarke and Marriott, contra. Relief is only *prima facie* evidence of a settlement, and therefore it was competent to the appellants to show that the father of the pauper had not any settlement in their parish, and for this purpose the order of sessions was tendered in evidence. Now when an order of removal is quashed by the sessions, it is conclusive between the same parties that the settlement of the pauper is not in the parish to which he was removed. And if, on the face of the former order of sessions it had appeared to have been decided, that at the date of that order the pauper's brother had not any derivative settlement in Knaptoft, or in other words, that his father was not settled there in 1815, it would now be conclusive as to that point between the same parties. Now that was the point actually decided upon the former appeal, although it does not appear on the face of the order. The parol evidence was tendered, to show *886] what the point litigated and adjudicated really was. This is not *like the case of a judgment of nonsuit, because there the party does not appear, and no point is decided. In *Rex v. Rudgley*, 8 T. R. 620, it appeared that a feme covert had been removed by an order describing her as a widow, that order was afterwards admitted in evidence, when a question arose as to the settlement of her husband, and was held to be conclusive as to that also.

Cur. adv. vult.

On a subsequent day the judgment of the court was delivered by

BAYLEY, J. In this case two justices, by their order, removed the pauper, Elizabeth Burdett, from the parish of Gumley to that of Knaptoft. The latter parish appealed; and upon the trial of the appeal, the respondents proved that

Knaptoft had relieved the pauper's father, while residing in the respondent parish, for five years prior to the year 1815. The appellant parish, in order to show that at the time when the relief was given the settlement of the father was not in Knaptoft, offered in evidence an order of sessions made in 1815, in an appeal between the same parishes respecting the settlement of the brother of the pauper. By that order of sessions the order of justices adjudicating that the brother was settled in Knaptoft was quashed. The court of quarter sessions refused to receive this evidence, and my brother HOLROYD and I, (before whom this case was argued,) are of opinion that it was properly rejected. The order of removal in the former case may have been quashed upon one of the three following grounds: either that the pauper had originally a settlement in Knaptoft, and acquired a subsequent settlement *in another parish, or that he never had any settlement in Knaptoft, or that the respondents had not [*887 given sufficient proof of any such settlement. The case does not state on what ground the order was quashed. But it has been stated in the course of the argument, that the point then tried, and upon which the sessions actually adjudicated, was, that the pauper had not at that time any derivative settlement in Knaptoft, because his father was not then settled there; that in fact the point tried was, whether the father's settlement was then in Knaptoft. If we thought that the evidence of that fact would be admissible, and would be material if stated in the case, we should send it down again to the sessions. But we are of opinion, that the order of sessions in 1815 would not be admissible in evidence, for the purpose of showing that the pauper, in 1815, was not settled in Knaptoft. If it be admissible at all, it must be upon the same principle upon which judgments of the superior courts are received in evidence. Now the rule upon that subject is thus laid down, in the *Duchess of Kingston's* case, Howell's St. Tr. vol. xx. p. 538, by Lord Ch. J. DE GREY; "The judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the *same matter directly in question* in another court; secondly, the judgment of a court of exclusive jurisdiction, *directly upon the point*, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, *though within their jurisdiction; nor of any matter [*888 incidentally cognisable, nor of any matter to be inferred by argument from the judgment." The principle, therefore, is, that the judgment of the same court, or of a court of concurrent jurisdiction, is conclusive evidence between the same parties upon the same subject-matter directly in question in another court; but that as to any matter arising collaterally, it is no evidence whatever. Then the question to be considered in this case is, whether the point actually decided with respect to the settlement of the brother in 1815 is necessarily the same as that which was to be decided by the court in the present case with respect to the sister; or whether the point now sought to be established as to the father's settlement was one which then came collaterally in question. When we consider the nature of an order of removal, it is quite clear that the point decided in 1815 is not necessarily the same as that which the court of quarter sessions were called upon to adjudicate in the present instance. When a party is removed to a parish as the place of his settlement, and the order of removal is confirmed by the sessions, that is an adjudication by them, that the pauper at the time of the order of removal was settled in the appellant parish. In the case of *The Inhabitants of Harrow v. Ryslip*, 2 Salk. 524, it was held that a confirmation of an order of removal upon appeal was final as to all parishes; because the very point decided is, that the pauper is settled in the parish to which he has been removed. But where the order of removal is quashed, the sessions only adjudge negatively that the pauper is

not settled in the appellant parish. They do not say affirmatively that he is *889] settled in any other *parish. The point decided, therefore, by the sessions in 1815 was, that the brother of the pauper in this case was not at that time settled in the parish of Knaptoft; but it is said, that although that is the only point which appears to have been decided upon the face of the judgment itself, still that the point actually decided upon the evidence then adduced was, that the settlement of the father of the pauper was not at that time in Knaptoft, and consequently that the pauper himself had no derivative settlement there. The parol evidence was offered to prove that such was the point then litigated and adjudicated. Without deciding whether such evidence was admissible to explain the ground of the judgment, it is sufficient to say, that that was a point which arose collaterally, and, therefore, upon the principle laid down by Lord Ch. J. DE GREY, the order of sessions would not be evidence to prove that fact in another case between the same parties. For these reasons, therefore, we think that the order of sessions ought to be confirmed.

Order of sessions confirmed.

The KING v. The Inhabitants of ST. NICHOLAS, in the Borough of LEICESTER.

An illegitimate child born in an extra-parochial place does not follow the settlement of its mother.

Upon appeal against an order of two justices, for the removal of Caroline Littlewood from the parish of All Saints, in Derby, to the parish of Saint Nicholas, in Leicester, the sessions confirmed the order, subject to the opinion of this court, on the following case:

The pauper was the illegitimate child of Elizabeth Littlewood, deceased, and *890] was born in the month of *May, 1822, in an extra-parochial place, called the Black Friars, in Leicester, which is not a vill, and for which no overseers have ever been appointed. She was shortly afterwards taken by her mother to the parish of All Saints, Derby, where she remained until the death of her mother, and up to the time of making the order of removal in question. Elizabeth Littlewood, the mother, had, six years previously to the birth of the pauper, gained a settlement in the parish of Saint Nicholas, and was legally settled in that parish at the time of the birth of the child and of her own death.

Clarke, in support of the order of sessions. This child having been born in an extra-parochial place, has not any settlement by birth, and, therefore, if it does not follow the settlement of the mother, it has not any settlement. In *Sutley v. Whitbourn*, 2 Bulstr. 358, 2 Bott. pl. 3, it was settled, that if a woman with child in the house of correction be there delivered of a bastard, the child shall be sent to the parish from which the mother was sent to the house of correction, to be there kept and provided for, this being the place where she was last settled; and that was before any statute was passed upon the subject. The 49 G. 3, c. 68, s. 2, may be relied upon by the other side. That statute enacts, "that if any single woman shall declare herself with child, and that such child is likely to be born a bastard, and to be chargeable to any parish, township, or extra-parochial place, then the person charged by the woman with being the father of the child shall be compelled to give security to indemnify the parish or place, but the act of parliament alludes to an extra-parochial place maintaining its own poor.

*891] *Nolan* and *Fynes Clinton*, contra, were stopped by the court. BAYLEY, J. The argument in support of the order of sessions is founded upon the assumption, that every person is by law entitled to a settlement in some place; but that is by no means the case, for foreigners have not any settlement in this country. A settlement attaches to those persons only,

concerning whom those circumstances may be affirmed, which acts of parliament say shall give a settlement. Generally speaking, an illegitimate child is settled in the parish where it is born. There are some exceptions to this general rule, noticed in the treatises on the poor laws. In most of the excepted cases the mother, at the time of the birth, is in law supposed to be in the place of her settlement, where she ought to be: as where a woman with child is removed out of one parish into another, through the fraud or collusion of its officers, or where the child is born pending an order of removal. In one of these cases, the child, when born, is settled in the parish from which the mother has been fraudulently removed; in the other, in the parish to which she is ordered to be removed.^(a) In this case the child was born in an extra-parochial place. It therefore has not any settlement by birth, and being a bastard, it can derive none from its parent. In such cases, however, it is entitled to remain with its mother as long as the purposes of nurture require it, and it will afterwards be entitled to relief as casual poor, although it has not any settlement. We are all of opinion that the order of sessions must be quashed.

Order of sessions quashed.

(a) See several cases in 2 Bott. c. 1, s. 1.

*The KING v. The Inhabitants of APETHORPE.

[*892]

Where a pauper served under a yearly contract in the parish of A., and was again hired in the same parish by the same master for a less period than a year, (there being no interruption of the service,) and during the latter period removed with his master into the parish of B., and served him there: *Held*, that the pauper did not acquire a settlement in that parish, inasmuch as no part of his service there was under a yearly hiring.

UPON appeal against an order of two justices, for the removal of H. Scotney and Rebecca his wife, from the parish of Apethorpe, in the county of Northampton, to the parish of Sudborough, in the same county, the sessions quashed the order, subject to the opinion of this court on the following case:

The pauper, H. Scotney, being settled in Apethorpe, was hired about six years ago by a Mr. Gilby, of Brigstock, for a year, to commence at Old Michaelmas, the whole of which service he performed in Brigstock, sleeping also in that parish. Before the expiration of the year Mr. Gilby again hired the pauper from the following Old Michaelmas to the New Michaelmas succeeding. There was no interruption of the service; and under the second hiring the pauper served his master about half a year in Brigstock, and then removed with him to Sudborough, in which latter parish he finished his service under such second hiring, and slept the last forty nights in Sudborough.

Holbeck and Adams in support of the order of sessions. In order to gain a settlement in any parish, some part of the service must be under a contract of hiring for a year. The service in Sudborough was not under any such contract. The statute 3 & 4 W. & M. c. 11, s. 7, enacts, that if any person shall be lawfully hired into any parish for one year, *such service* shall be deemed a good *settlement *therein*. The words *such service* evidently refer to a service under the contract of hiring for a year; and such service will [*893] give a settlement in that parish into which the party is lawfully hired for a year. In *Rex v. Croscombe*, Burr. S. C. 256, 2 Bott. 278, a yearly hiring in the second year was presumed from the continuance in the same service without any new agreement, and then it is the same as if there had been an express contract of hiring in that year; and if that were so, it is quite clear that a settlement was gained by the service in the second year. From the judgment delivered by WILLES, J., in *Rex v. St. Giles, Reading*, Caldecott, 54, that appears to have been the ground of the decision in *Rex v. Croscombe*. They cited *Rex v. Fillongley*, 1 B. & A. 319, and *Rex v. Denham*, 1 M. & S. 221.

Marriott and Humfrey, contra. Where there has once been a contract

of hiring for a year, and the service continues, it need not be under any new contract of hiring for a year in order to confer a settlement. The 8 & 9 W. 3, c. 30, s. 4, recites that some doubts had arisen "touching the settlement of unmarried persons not having child or children, lawfully hired into any parish or town for one year, and enacts that no such person so hired as aforesaid shall be adjudged or deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the *same service* during the space of one whole year." Under this statute, therefore, if there has been once a contract of hiring for a year, a service under the same master for one year, though not under the original contract, will give a settlement. That was

*894] "the point decided in *Rex v. Croscombe*. There the contract of hiring had expired, and the master, and the servant as part of his family, removed into another parish, where the servant continued to serve for six months without any new agreement; and it was held that he gained a settlement in this second parish where he served the last forty days. It is true, that a contract of hiring in the second year might have been presumed from the circumstance of the servant's continuing in the service without any new express agreement; but that was not the ground of the decision. Lord Ch. J. LEE, in delivering the judgment of the court, said that, under the statute 8 & 9 W. 3, c. 30, s. 4, it was sufficient if the service were the same in the second year, and that it need not be under the same hiring. That case, therefore, is expressly in point.

BAYLEY, J. I am of opinion that the order of sessions is right. If the pauper gained any settlement in the parish of Sudborough, in this case, it would follow, that wherever there was once a hiring for a year, and the pauper afterwards continued with the master as a weekly servant for twenty years, and resided in twenty different parishes, he would be settled in the parish where he resided for the last forty days, although at that time he were not hired for a year. It appears to me that the case of *Rex v. Croscombe* does not bear upon the present case. There the pauper hired himself to live with Dr. LUCY as his servant for a year for 4*l*. and a livery; he did accordingly live with his master during that year, and without coming to any new agreement, continued with his master in the same parish about a quarter of a year longer. The

*895] master then removed to another parish, and the pauper continued to live with him about six months in the latter parish upon the terms of the first contract, and was paid wages at the same rate. Now in that case, at the expiration of the first year, a new hiring for a year was fairly to be presumed from the circumstance of the pauper continuing in the same service without any alteration of the terms; and if the service of the last year was to be considered as a service under a renewed yearly hiring, that case does not at all bear upon the present. That such was the ground upon which the court proceeded in that case appears from what was said by WILLES, J., in delivering the judgment of the court in *The King v. St. Giles, Reading*, Caldecott, 56; "*The King v. Croscombe* does not apply, because the court presumed the continuance of the old contract." There being no authority therefore bearing upon the subject, we must look to the words of the statute 3 & 4 W. & M. c. 11, s. 7: they are, "if any unmarried person, not having child or children, shall be lawfully hired into any parish or town for one year, such service shall be adjudged and deemed a good settlement *therein*." The word *therein* refers to the parish or town into which the party has been hired for one year. The settlement therefore attaches to him in that parish or town where he has the character of a servant hired for a year. The 8 & 9 W. 3, c. 30, recites, "that doubts had arisen touching the settlement of unmarried persons, not having child or children, lawfully hired into any parish or town for one year;" and enacts, "that no such person *hired as aforesaid*, (i. e. lawfully

*896] hired into the parish for one year,) shall be adjudged or deemed to have a good settlement in any such parish or township, unless such person

shall continue and abide in the same service during the space of one whole year." The latter statute therefore requires, that in order to gain a settlement by the hiring and service mentioned in the former statute, (which was a hiring into a parish for a year,) the party should continue in the same service for the space of one whole year. The former statute requires, that the contract should be for a year, and that the service should be under the contract of hiring there mentioned. The latter statute requires besides, that in order to gain a settlement, the service should continue for a year. I am therefore of opinion, that a settlement can be gained by hiring and service in that parish only where the party has the character of a servant hired for a year; and that being so, the pauper in this case did not gain any settlement in the parish of Sudborough, and therefore the order of sessions is right.

HOLROYD, J. The case of *Rex v. Croscombe* is distinguishable from the present, upon the grounds stated by my brother BAYLEY. In that case Lord Ch. J. LEX certainly gave an extrajudicial opinion, that the service in the second year need not be under any contract of hiring, provided it was a continuance of the same service; but when the state of the law, as it existed between the passing of the 3 & 4 W. & M. c. 11, and the 8 & 9 W. 3, c. 30, comes to be considered, I think it perfectly clear that that opinion cannot be supported. By the 13 & 14 Car. 2, c. 12, overseers were authorized to remove a pauper to a parish which was his last place of settlement for forty days, either as a householder, &c., or as a servant. At that time, therefore, a service for forty days conferred a settlement. The 3 & 4 W. & M. c. 11, s. 3, enacts, that the forty days' continuance of any person in a parish or town, which then conferred a settlement, should be accounted from the publication of a notice in writing which he should deliver to the churchwarden or overseer of the poor, and the latter was to cause it to be read publicly in church. Sect. 6 provided, that any person exercising an annual office in the parish during the year should gain a settlement without having delivered such notice in writing; and sect. 7 enacted, that if any unmarried person, not having any child or children, should be lawfully hired into any parish or town for one year, such service should be adjudged and deemed a good settlement therein, although no notice in writing were delivered and published. Now, the words *such service* must refer to a service under the contract of hiring mentioned in the former part of the clause; and if that be so, this statute clearly required that the service should be under a contract of yearly hiring. The legislature in this statute seem to have considered the exercising of an annual office in the parish during the year, and the being hired into the parish for a year, as equivalent to the notice to the parish which was required by the former section. Inasmuch, however, as the exercising of the parochial office was not sufficient to give a settlement unless it were exercised during the year, doubts were entertained whether the service under the contract of hiring should not also continue during a year. If the service for the year were not required by that statute, the contract of hiring for the year is the only circumstance from which the parish could be deemed to have had notice; and if so, it was essential that the contract should be made in the parish. But doubts being entertained whether service for a year was required, the 8 & 9 W. 3, c. 30, was passed. Sect. 4 recites, that doubts had arisen touching the settlement of persons unmarried, not having any child or children, lawfully hired into a parish or town for one year; and then enacts, that no such person so hired as aforesaid shall be deemed to have a good settlement in such parish or township, unless such person shall continue in the service during the space of one whole year. The latter statute did not intend to dispense with any thing required by the former, but to add another qualification to those already required to confer a settlement. The service spoken of in the latter statute is the same service that was contemplated by the 3 & 4 W. & M. c. 11, viz., a service under a contract of hiring for a year. I

think, therefore, that in order to give a settlement in any parish, some part of the service must be under a contract of yearly hiring. That being so, there was no settlement in the parish of Sudborough, and the order of sessions must therefore be confirmed.

Order of sessions confirmed.

*899]

*MILLS v. FUNNELL.

By a local act, giving to commissioners certain powers to be exercised for the preservation of the town of B. from the encroachments of the sea, it was enacted that there should be paid to the commissioners any rate or duty which they should think fit to order, not exceeding the sum of 3s. for every chaldron of coal brought or delivered within the limits of the town: *Held*, that under this act a duty was payable in respect of each quantity of coals, amounting to a chaldron, brought into the town, although at different times and in several parcels, each containing a less quantity than a chaldron.

DECLARATION stated, that the plaintiff, treasurer to the commissioners acting under a certain act of parliament, passed in the 50th year of G. 3, entitled "An act to repeal an act, made in the 13th year of his present majesty, for paving, lighting, and cleansing the town of Brighton, in the county of Sussex, and removing and preventing nuisances and annoyances therein; for regulating the market; for building and repairing groynes, to render the coast safe and commodious for landing coal and culm, and laying a duty thereon; and for making other provisions in lieu thereof; and for regulating weights and measures, and building a town-hall;" complained of the defendant of a plea, that he rendered to plaintiff (as such treasurer) 20*l.* 8*s.* 4*d.*, which he owed, &c.; for that whereas, after the passing of the act, to wit, on the 8th of May, 1822, at, &c., at a certain meeting of the commissioners then and there duly held in pursuance of the said act, they duly made a certain order in writing in pursuance of the act; by which said order the said commissioners then and there duly ordered and directed, that from the first day of May then instant, for one year, a rate or duty should be paid of 3*s.* per chaldron on all sea-coal, culm, or other coal, which should be brought or delivered within the limits of the said town; the declaration then set out a similar order, duly made on the 30th April, 1823, to

*900] take effect from the 1st day of May then next, for one year, of which *said several premises defendant afterwards, to wit, on the day and year last aforesaid, at, &c., had notice; and plaintiff, treasurer as aforesaid, further saith, that the defendant, after the making of the said first-mentioned order, to wit, on the 10th of May, 1822, and on divers other days and times between that day and the day of exhibiting this bill, to wit, at, &c., brought and delivered, within the limits of the said town, divers large quantities, in the whole amounting to a large quantity, to wit, sixty-eight chaldrons and four bushels of coals, in quantities, on each of the said days and times, less than one chaldron, by means whereof, and according to the true intent and meaning of the act, defendant then and there became liable to pay, and ought to have paid to the commissioners, or to their collector for the time being, divers sums of money, as and for the rates and duties payable for and in respect of such coals so brought and delivered by defendant, within the limits of the said town as aforesaid, amounting in the whole to a large sum of money, to wit, the sum of 10*l.* 4*s.* 4*d.*, being at and after the rate of 3*s.* for each chaldron of the same coals, whereby, and by force of the statute, an action accrued to the plaintiff, as treasurer of the commissioners as aforesaid, to demand and have of and from the defendant the said sum of 10*l.* 4*s.* 4*d.*, parcel of the sum above demanded. Plea, *nil debet*. The plaintiff having obtained a verdict, a rule nisi had been obtained for arresting the judgment, on the ground that the first order of the commissioners was bad, because it was retrospective. Secondly, that the duty was claimed in respect of sixty-eight chaldrons and four bushels; that at all events no duty was payable in respect of the four bushels, and that an entire

sum being claimed in *respect of the whole quantity the count was bad. [901
 Thirdly, that the act of parliament did not give any right to a duty in
 respect of coals brought into the town, in less quantities than a chaldron. (a)

**Marryat* and *Long* showed cause. The order is not retrospective, it [902
 merely directs that the duty shall be levied in future for a year, to be calculated from the 1st of May preceding. If it be retrospective, it is bad for the by-gone time and good for the residue. Secondly, the duty is claimed for divers large quantities, amounting to a certain quantity, to wit, sixty-eight chaldrons and four bushels; being under a scilicet the quantity is immaterial. Thirdly, this act of parliament is more than remedial, it is conservative. The object is to preserve the town of Brighton against the encroachments of the sea; it ought, therefore, to be construed most liberally with reference to that object. Now if the construction contended for be adopted, the object of the legislature may be entirely defeated, because entire cargoes may be delivered within the limits of the town, without paying any duty, provided they be brought into the town in distinct parcels, each containing a less quantity than a chaldron.

Taddy, Serjt., contra. The first order is retrospective, and therefore wholly void, and the money being claimed under that order, the count is bad; 2dly, the duty is claimed in respect of an entire quantity, and no duty is payable, at all events, in respect of the four bushels. [BAYLEY, J. In that case the plaintiff may have judgment for the sum claimed in respect of the sixty-eight chaldrons, and may enter a remittitur for the residue. In the case of *Ingledew v. Cripps*, 2 Ld. Raym. 814, 2 Salk. 658, an action of debt was brought on a covenant to pay so much for every hundred stacks of wood. The plaintiff claimed *an entire sum for so many hundred and a part of a hundred, and it was [903 held upon demurrer that the plaintiff might enter a remittitur as to the sum claimed for the part of a hundred, and have judgment for the residue.] The act of parliament imposes the duty upon every chaldron brought into the town. Now, in this case, in no instance was the quantity of a chaldron brought into the town. The duty therefore never attached. In *Ingledew v. Cripps* it was held, that under a covenant to pay so much for every hundred stacks of wood, the party is not liable to pay for a less quantity than a hundred. So on the same principle, the public are not bound to pay a duty for any quantity less than a chaldron.

(a) The following is the clause of the statute upon which the principal question in the case was raised.

And whereas by the said recited act, section 107, it was enacted that the commissioners named and appointed in and by the same should be trustees for repairing, improving, maintaining, and preserving the groynes that had been erected for the preservation of the said town, and erecting and building any new ones, or such other works as should appear to them most proper for that purpose; and the sum of sixpence for every chaldron of sea coal, culm, and other coal that should be landed on the beach of the coast of the said town was directed to be paid to the said commissioners; and the commissioners were thereby empowered to borrow any sum of money not exceeding the sum of 1500*l.* upon the security of the said duty: And whereas the said commissioners did accordingly borrow the sum of 1500*l.* upon the credit of the said duty, great part of which is now due and owing: And whereas, since the passing of the said act, great encroachments have been made by the sea upon the coast adjoining the said town, and the said duty hath been found inadequate to the charges and expenses of erecting new groynes, walls, and other fences or works, which are now necessary for the safety and protection of the said town against such encroachments; be it therefore enacted, that from and after the passing of this act, it shall and may be lawful to and for the said commissioners, and they are hereby authorized and required from time to time, as to them shall seem necessary and expedient, to repair, improve, and maintain, add to, alter, or remove the groynes, walls, or other fences or works already erected and built, or to be made, erected, and built, or to cause to be made, erected, and built, any new groynes, or other works whatever, which may appear to them necessary, requisite, or proper for the safety of the said town or any part thereof, or any part of the beach or shore within the said town; and that from and after the passing of this act there shall be paid to the said commissioners, or to their collector or collectors, or to such person or persons as they shall from time to time appoint to collect and receive the same, any rate or duty which the said commissioners shall think fit to order and direct, not exceeding the sum of three shillings for every chaldron of sea coal, culm, or other coal which shall or may be landed on the beach of the said town, or in any other manner by land-carriage, or otherwise brought or delivered within the limits of the said town.

BAYLEY, J. I am of opinion, that the rule for arresting the judgment must be discharged. If the first order of the commissioners were retrospective, it would be void for the by-gone time, but good for the residue; for it clearly applies to such coals as should thereafter be brought into the town. The principal question in this case is, whether the duty imposed by the act of parliament attaches in respect of coals brought or delivered within the limits of the town in separate parcels containing a less quantity than a chaldron, but the aggregate amount of which exceeds a chaldron. The legislature contemplated, that the inhabitants of Brighton would derive a great benefit by having the coast rendered safe and commodious for landing coal and culm; and, therefore, thought it just that they should contribute to the expense which would necessarily be incurred in building and repairing groynes, and the other improvements contemplated in the act. The 13 G. 3, c. 34, had *imposed a duty of 6d. for every chaldron of coals landed on the beach of the coast of the town. The 50 G. 3, c. 38, imposes a duty not exceeding the sum of 3s. for every chaldron of coals landed on the beach of the town, or in any other manner by land-carriage, or otherwise brought or delivered within the limits of the town. The words of the enacting clause are satisfied if the duty does not exceed the rate of 3s. for every chaldron. It does not make any distinction as to the quantities brought into the town at each time, but the duty is payable in respect of every chaldron of coal brought or delivered within the limits of the town. Inasmuch as the inhabitants of Brighton derive a benefit from the making of the improvements contemplated by the legislature, it seems reasonable that they should be liable to the duty imposed upon all coals brought into the town, whether they be brought into the town in small or large quantities; for otherwise the duty may be evaded, and the object of the legislature defeated. We are not necessarily called upon to decide whether any duty be payable for a fraction of a chaldron, for the declaration states, that the defendant brought and delivered within the limits of the town divers large quantities of coal, in the whole amounting to a large quantity, *to wit*, sixty-eight chaldrons and four bushels of coals. Inasmuch as the quantity is laid under a scilicet, the plaintiff was not bound to prove the precise quantity laid; but assuming the duty to be claimed in respect of that precise quantity, still the plaintiff would be entitled to judgment for the duty in respect of the sixty-eight chaldrons, and might enter a remittitur as to the residue. For these reasons I am of opinion, that the rule for arresting the judgment must be discharged.

*905] HOLROYD, J. I also think that there is no ground for arresting the judgment in this case. If the order were retrospective, I should have great difficulty in saying that it is therefore void in toto; but I think it is not retrospective. It is true, that the order speaks of a day past with reference to the calculation of time during which it is to continue in force, but the duty is to be paid in future. In effect it is, that the duty is to be paid in future for a year, to be calculated from the 1st of May. It is not necessary to decide in this case, whether any duty would attach upon a fraction of a chaldron. Worded as this order is, I incline to think it would not; but I think it clearly would attach if a quantity amounting to a chaldron were brought in at different times, because the duty is payable for every chaldron brought or delivered within the limits of the town. There is nothing in the act to show, that the legislature intended that the duty should not attach upon a chaldron of coals, brought in in small quantities, at different times; and in order to give full effect to the act of parliament I think we are bound to hold, that the duty is payable in respect of every chaldron of coals brought into the town, though in parcels containing a less quantity than a chaldron, for otherwise the object of the act might be defeated. As to the objection that the duty is claimed in respect of sixty-eight chaldrons and four bushels, I think that does not invalidate the

count, because as to so much as is claimed in respect of the four bushels, the plaintiff may enter a remittitur, and have judgment for the residue.

LITTTLEDALE, J. I am of the same opinion. If the order were retrospective it would only be bad in part, but *I think it is not retrospective. The effect of it is, that the duty is to be collected for one year, to be calculated from the first of May. If the sum claimed in this case became due to the plaintiff, under a contract to pay an entire sum for every chaldron of coals, it could not be apportioned, because, in such a case, the parties themselves make the performance of the whole contract a condition precedent to any thing becoming due, and the intention of the parties could only be collected from the words of the contract itself; but the intention of the legislature, in such an act as the present, is to be collected, not merely from the words of the clause imposing the duty, but from the other parts of the act, and the whole is to be construed with reference to the object which the legislature had in view. Now, here the object was to raise a sum of money to defray the expenses which would necessarily be incurred in securing the inhabitants of Brighton against the encroachments of the sea, and we ought to construe the act so as to advance that object. If we held that a duty was not payable in respect of coals brought or delivered within the limits of the town, in separate parcels, containing a less quantity than a chaldron, it is possible that no duty whatever might be payable, and all the objects of the act defeated. I think, therefore, that in construing the words of the enacting clause, with reference to the object of the legislature, we ought to hold that a duty is payable in respect of every chaldron of coals brought into the town, even if they be brought in distinct parcels containing a less quantity than a chaldron. The same rule of construction ought to be applied to this act as to other acts providing for the general revenue of the kingdom, which are for the *public benefit. The 59 G. 3, c. 52, s. 12, imposes a certain duty upon every hundred pounds weight of cotton-wool. It might as well be contended, that no duty would be payable in respect of any quantity of cotton-wool exceeding one hundred pounds weight, provided it were imported in different ships, and each ship contained less than one hundred pounds' weight. Now, as the object of that act was to raise a revenue for the public benefit, by the imposition of a duty upon cotton-wool, I cannot entertain a doubt that a duty would be payable in respect of cotton-wool, imported in less quantities than one hundred pounds' weight; and applying the same rule of construction to this act, I think that as the object of the legislature was to raise a sum of money to defray expenses incurred for public purposes, that the duty is payable under this act for every chaldron of coals brought within the limits of the town, whether it be brought in distinct parcels containing a less quantity than a chaldron or not.

Rule discharged.

O'BRIEN v. SAXON.

[*908]

In an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff being a trader, and being indebted to the defendant in the sum of 100*l.*, became bankrupt, wherefore the defendant sued out the commission. Replication *de injuria sua propria*. Demurrer assigning for cause, that the plaintiff by the replication had attempted to put in issue three distinct facts, the act of bankruptcy, the trading and the petitioning creditor's debt: *Held*, that these three facts connected together constituted but one entire proposition, and that the replication was therefore good.

DECLARATION for maliciously, and without any reasonable or probable cause, suing out a commission of bankruptcy against the plaintiff. Plea, that before the suing out of the commission, to wit, on, &c., at, &c., the plaintiff being a dealer and chapman, and seeking his trade, of living by buying and selling, and being indebted to the defendant in the sum of 100*l.* and upwards, became and

was a bankrupt, within the meaning of the several statutes then and still in force concerning bankrupts, or some or one of them, wherefore the defendant sued out the commission of bankrupt in the declaration mentioned. Replication, that the defendant, of his own wrong, and without the causes by him, in his plea alleged, committed the said grievances in the declaration mentioned. To this replication the defendant demurred, and assigned for cause, that the plaintiff had attempted to put in issue three distinct allegations, contained in the defendant's plea, viz., the plaintiff's trading, his bankruptcy, and the petitioning creditor's debt.

Manning, in support of the demurrer, cited *Cockerell v. Armstrong*, Bull. N. P. 93; that was trespass for taking a gelding, and the defendant pleaded, *909] that the locus in quo was *100 acres, and that J. S. was seised thereof in fee, and that the defendant as his servant, and by his express orders, took the gelding damage feasant. The plaintiff replied, de injuria sua propria absque tali causa; and it was held, that the replication was bad, because it put in issue three or four things. In this case the replication put in issue the trading, the act of bankruptcy, and the petitioning creditor's debt, and therefore is bad.

Campbell, contra, was stopped by the court.

Per Curiam. Those three facts connected together constitute but one entire proposition, and therefore the replication is good. In *Crogate's* case, 8 Co. 132, it is laid down, that the general replication, de injuria sua propria, is proper, when the defendant's plea consists of matter of excuse, and of no matter of interest whatever. Here the plea consists of matter of excuse only. In *Robinson v. Rayley*, 1 Bur. 316, the defendant in trespass pleaded a right of common for his cattle, levant and couchant. The plaintiff replied, that they were not his own commonable cattle levant and couchant. The defendant demurred specially, because the replication was multifarious; but the court held the replication good, the rule being, not that issue must be joined on a single fact, but on a single point, and that it was not necessary that this single point should consist only of a single fact; and Lord Mansfield says, "Here the point is, the cattle being entitled to common: this is the single point of the defence; but in fact they must *be both his own cattle, and also levant *910] and couchant, which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite." So in this case the point is, whether the plaintiff duly became bankrupt; and in order to establish that, there must be a trading, an act of bankruptcy, and a good petitioning creditor's debt; and these three circumstances are essential to constitute him a bankrupt. The judgment, therefore, must be for the plaintiff.

Judgment for the plaintiff.

See Stephen on Pleading, 274.

WILLIAMS v. MORLAND.

Where, in case a plaintiff alleged in his declaration that he was possessed of a messuage and premises, and by reason thereof entitled to the use of a stream of water running through the premises for supplying the same with water; and that defendant erected a certain dam higher up the stream, and thereby prevented the water from running in its usual course, in its usual calm and smooth manner, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff; and on issue joined on a plea of not guilty, the jury found that the plaintiff's banks and premises were not injured by the dam erected by the defendant; but added, that defendant had no right to stop the water in the summer-time; the judge ordered the verdict to be entered for the defendant: *Held*, that the verdict was right, for flowing water is publici juris, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose, and therefore, the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water.

DECLARATION stated, that the plaintiff, before the committing of the griev-

ances thereafter mentioned, was lawfully possessed of a messuage or dwelling-house, lands, and premises, with the appurtenances, and by reason thereof of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a stream, called the Lee river, and which during all that time of right ought to have run and flowed, and until the committing of the grievances thereafter mentioned, of right had *run and flowed, and still of right ought to run and flow, unto and past [911] the lands and premises of the plaintiff, for supplying the same with water; yet the defendant, well knowing the premises, but contriving, &c., here tofore, and whilst the plaintiff was possessed of the tenements, with the appurtenances, to wit, on &c., at, &c., wrongfully and injuriously erected and made a certain pent-stock, dam, or floodgate, in and across the said stream, higher in the said stream than the tenements of the plaintiff, and wrongfully and injuriously widened and enlarged a certain other pent-stock, dam, or floodgate, then being in and across the said stream, higher in the said stream than the lands and premises of the plaintiff, and kept and continued the said first-mentioned pent-stock, dam, or floodgate so erected and made, and the said other pent-stock, dam, or floodgate so widened, enlarged and altered respectively, in and across the said stream, for a long space of time, to wit, from thence hitherto and thereby unlawfully and wrongfully prevented the water of the stream from running and flowing along its usual and regular course, and in its usual calm, moderate, and smooth manner, unto and past the lands and premises of the plaintiff, as the same otherwise would have done, and thereby the water of the stream ran and flowed in a different direction or channel, and with much greater force and increased violence and impetuosity, unto and against the banks and premises of the plaintiff, and undermined, washed away, damaged, and destroyed the banks of the lands of the plaintiff, &c. The second count stated, that the defendant wrongfully and injuriously stopped, hindered, and prevented the water of the stream from running or flowing unto and past the tenements of the plaintiff, along its usual or *regular course, and in its usual calm [912] and smooth manner, as the same otherwise would have done, and also wrongfully and injuriously caused the water of the stream to run and flow in another direction with much greater force, violence, and impetuosity, than it of right ought to have and would have done, in and against the lands and premises of the plaintiff, and thereby the banks and other parts of the lands and premises, &c., were damaged (as in the last count). Plea, not guilty. At the trial before GRAHAM, B., at the last Summer assizes for the county of Kent, the jury found that no damage had been done to the plaintiff's banks or lands either by the pent-stock set up, or that which was enlarged, but that their bad condition was owing to the plaintiff's neglect to repair them; and they added, that they thought the defendant should not stop the water in the summer-time. It was then insisted, that the plaintiff was entitled, upon this finding, to a verdict, because the defendant had stopped the water from coming to the plaintiff's premises in the summer-time. But the learned judge was of opinion, that inasmuch as the plaintiff, in his declaration, did not complain that he was deprived of a supply of water, but that the natural course of the stream was altered, and that the water was caused to flow with greater impetuosity against his lands, whereby his banks were injured; and as the jury had found that the banks were not injured from such flowing of the water, the defendant was entitled to a verdict. Liberty, however, was reserved to the plaintiff to move to enter a verdict, with nominal damages. A rule nisi having been obtained for that purpose in last Michaelmas term,

**Marryat* and *Bolland* were to have shown cause, but the court [913] called upon

Chitty, in support of the rule. The jury have found, that the defendant ought not to stop the water from coming in summer to the plaintiff's premises.

The stoppage of that water of itself is an injury, although no actual pecuniary damage ensue. In trespass to land it is not necessary to prove any actual damage; and if special damage be alleged, it need not be proved. Here the second count stated, as the ground of complaint, that the defendant wrongfully prevented the water from coming to the plaintiff's premises; that of itself constituted an injury, and then it was unnecessary to prove the special damage alleged; and therefore the plaintiff is entitled to the verdict.

BAYLEY, J. I think that this rule ought to be discharged. My judgment in this case is founded on the nature of flowing water, and the manner in which an exclusive right to it is obtained. Flowing water is originally publici juris. So soon as it is appropriated by an individual, his right is coextensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains publici juris. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now if this be the true character of the right to water, a party complaining of the breach of such a right ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose. Here the declaration states a right to the use of this water at all *914] times; but still, if *the plaintiff had as much water as could be necessary for his purposes, the defendant would have been guilty of no wrong, by preventing additional water from coming to the plaintiff's premises. The gravamen of the plaintiff's complaint in his declaration is, not that the defendant prevented him from having the quantity which had formerly flowed to his premises, but that the defendant prevented the water of the stream from flowing along its usual course, in its usual, calm, moderate, and smooth manner unto the plaintiff's lands, and that his banks were injured by the impetuous manner in which it was caused to flow, by the act of the defendant. Now the jury have found, that the banks, &c., were not injured by the manner in which the water flowed; and that being so, it appears that the plaintiff has not sustained the injury complained of in the declaration, and therefore the verdict is properly entered for the defendant.

HOLROYD, J. I think the verdict was properly entered for the defendant in this case. Running water is not in its nature private property. At least it is private property no longer than it remains on the soil of the person claiming it. Before it came there, it clearly was not his property. It may, perhaps, become, quasi, the property of another before it comes upon his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands before any other person had acquired a prior right to it. Thus in *Bealey v. Shaw*, 6 East, 208, the defendants or those under whom they claimed had appropriated to themselves a quantity of the flowing *915] water of the river Irwell, *sufficient for the purposes of working their mill. The plaintiff afterwards erected premises lower down the stream, and appropriated to himself the surplus water for the use of his works. Four years after the plaintiff had erected his works, the defendants widened their sluice, so that nearly double the quantity of water was drawn from the stream, and the plaintiff's works were thereby materially impeded. It was held in that case, that although the defendants might originally have appropriated the whole water to themselves, yet they could not do so after the plaintiff had appropriated the residue of the unappropriated water to himself. If the plaintiff, therefore, in this case, had shown in his declaration a right to the unappropriated water of the stream, and had alleged as the ground of his complaint that he had been deprived of the use of that surplus water, he might then have been entitled to a verdict. But the present declaration is framed to meet a different case from that now relied upon. The gravamen of the complaint is not that the water was prevented by the act of the defendant from coming down to the plaintiff's premises, and that he was injured by the want of water, but that

in fact, flowed in a more impetuous manner, and thereby damaged the plaintiff's banks; but the jury have found that no damage has been done to the plaintiff's bank, by the manner in which the water was caused to flow by the act of the defendant. The jury have, therefore, found against the plaintiff in respect of the right of action which he claims. The mere obstruction of the water which had been used to flow through his lands does not of itself give any right of action. In order to entitle himself to recover, he should show the loss of "some benefit, or the deterioration of the value of the premises.

LITTLEDALE, J. I think that the plaintiff is not entitled to have the [*916 verdict entered for him in this case. The first count does not allege that the plaintiff was deprived of any benefit to which he was entitled, but that his banks were injured by reason of the water having been caused to flow in an impetuous manner. The jury have found that his banks were not thereby injured, and therefore the proof has not supported that count. The second count does not allege that the plaintiff was deprived of the use of the water, but that the defendant wrongfully prevented the water from flowing past the lands of the plaintiff along its usual course, in its usual calm and smooth manner, as the same ought to have done, and that his lands were thereby injured. It is true, that in trespass for a wrongful entry into the land of another, a damage is presumed to have been sustained, though no pecuniary damage be actually proved. So in the case of an action for the obstruction of a right of common, or a right of way, any obstruction of that right, is a sufficient cause of action. The doing of any act calculated to injure that right is a sufficient ground of action, but, generally speaking, there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case. Now, assuming that the stopping of the water was a wrongful act of the defendant, has the plaintiff thereby sustained any temporal loss or damage. He alleges that he has sustained a damage, by his banks having been injured in consequence of the water flowing in a more impetuous manner. He does not allege that he has sustained any damage by the "actual loss of the [*917 water. The jury have found that he has not sustained the damage alleged; and, therefore, they have negatived the ground of action stated in his declaration. Water is of that peculiar nature, that it is not sufficient to allege in a declaration, that the defendant prevented the water from flowing to the plaintiff's premises. The plaintiff must state an actual damage accruing from the want of the water. The mere right to use the water does not give a party such a property in the new water constantly coming, as to make the diversion or obstruction of the water, per se, give him any right of action. All the king's subjects have a right to the use of flowing water, provided that, in using it, they do no injury to the rights already vested in another by the appropriation of the water.

Rule discharged.

*RICHARDS v. PEAKE.

[*918

Trespass for breaking and entering the plaintiff's close. Plea, prescribing in right of a messuage and land for a right of common of pasture on a down or common, whereof the close, &c., before the wrongful separation thereof, was parcel, and justifying the trespass, because the close in which, &c., was wrongfully enclosed and separated from the rest of the common. Replication, that the close in the declaration mentioned, in which, &c., was a close called Burgey Cleave Garden, and had for thirty years and more been separated, and divided, and enclosed from the common, and occupied and enjoyed during all that time in severalty and adversely to the person holding the messuage and land, in respect of which the right of common was claimed. Rejoinder, that the close in which, &c., had not been occupied or enjoyed for thirty years or upwards in severalty or adversely, as alleged in the replication. The jury found that part of the garden had been enclosed within the thirty years, and that the alleged trespass was committed in that part of the garden only: *Held*, that upon this finding, the defendant was entitled to the verdict, whether the words of the issue, "the close in which, &c.," constituted an entire or a divisible allegation. If it was

an entire allegation, it comprehended the whole of the enclosure to which the name of Burgey Cleave Garden attached, and in that case the plaintiff was bound to prove that the whole of the garden had been enclosed upwards of thirty years; or if it was a divisible allegation, it was confined in its meaning to that spot in which the trespass had been committed, and the jury having found that that spot had not been enclosed thirty years, it was immaterial whether the rest had been so or not.

TRESPASS for breaking and entering two closes of the plaintiff, situate in the parish of Frentishoe, in the county of Devon, and destroying hedges and fences. Plea, first, not guilty; secondly, that one E. Fosse was and still is seised in her demesne as of fee of a messuage, and divers, to wit, ten acres of land with the appurtenances, situate in the parish of Frentishoe. The plea then claimed by prescription, a right of common of pasture by E. Fosse, for and in respect of the messuage and land throughout a certain down or common, called Frentishoe Common, whereof the said closes in which, &c., until the wrongful separation and enclosure thereof, thereafter mentioned, were parcel for all the commonable cattle, levant and couchant, &c. It then stated a demise of the messuage and land with the appurtenances, to the defendant for a term not expired, his entry, and then justified the trespasses, because the said closes in which, &c., at the said several times when, &c., were wrongfully enclosed, separated, and divided *from the residue of the said down or common, with
 *919] the hedges and fences in the declaration mentioned, so that defendant could not have his common of pasture. Replication joined issue upon the plea of not guilty, and then as to the trespasses committed in one of the closes in the declaration mentioned, nolle prosequi. And as to the trespasses committed in the other close, that the said last-mentioned close in the declaration mentioned, in which, &c., at the said several times when, &c., was and is a certain close known by the name of Burgey Cleave Garden; and that the same close in which, &c., continually and for thirty years and more, had been separated, divided, and enclosed from the said down or common called Frentishoe down, and occupied and enjoyed during all that time, in severalty and adversely to the said E. Fosse, and to all those whose estate she had in the messuage and land with the appurtenances in that plea mentioned; and to her, and their tenants and farmers, occupiers of the said messuage and land with the appurtenances, and to all persons claiming under them: and without the exercise and enjoyment during that time of the said supposed common of pasture in that plea mentioned by the said E. Fosse, or those under whom she claims title to the said messuage and land with the appurtenances, her, or their farmers or tenants, or any of them, for or relating to the supposed common of pasture. And this, &c. Rejoinder, that the said last-mentioned close in which, &c., had not been, and was not, occupied or enjoyed during the time in the said replication mentioned, in severalty or adversely to the said E. Fosse, and to all those whose estate she had and hath in the said messuage and land with the appurtenances in that plea mentioned; and to her and *their tenants and farmers,
 *920] occupiers of the said messuage and land with the appurtenances; and to all persons claiming by, from, or under her, them, or any of them, without the exercise or enjoyment during that time of the said common of pasture in that plea mentioned by the said E. Fosse, or those under whom she claims title to the said messuage and land, in manner and form, &c. At the trial before BURROUGHS, J., at the last Summer assizes for the county of Devon, it appeared that Burgey Cleave Garden contained land, part of which had been enclosed and held in severalty upwards of thirty years. But whether the residue had been enclosed so long, there was a contrariety of evidence. The learned judge was of opinion, that upon the pleadings the defendant was entitled to a verdict if the trespass was committed only in a part of the garden which had not been enclosed and held in severalty upwards of thirty years; and he left it to the jury to say, whether any part of the garden had been enclosed within that time, and

whether the trespass was confined to that part. The jury having found, that part of the garden had been enclosed within that time, and that the trespass was committed in that part of the garden only, a verdict was entered for the defendant. A rule nisi had been obtained for entering a verdict for the plaintiff.

E. Lawes was to have shown cause; but the court called upon

C. F. Williams and *Manning* in support of the rule. The plaintiff made out the issue, by showing that some part of Burgey Cleave Garden had been enclosed, and held in severalty adversely for thirty years. Here "the evidence was, that the part enclosed, and held in severalty upwards of thirty years, was generally known by the name of Burgey Cleave Garden, although that name attached also to the other part subsequently enclosed. The plaintiff, therefore, had proved the issue in terms, that Burgey Cleave Garden has been enclosed and held in severalty thirty years. It is true, that in *Hawke v. Bacon*, 2 Taunt. 156, it was held, that if it is alleged that a close called A. has been separated and enclosed from a waste for twenty years, to support the allegation it is necessary to prove that every part of the close has been so long enclosed. That case, however, was expressly decided upon the ground, that "it did not differ from the common case of pleading *liberum tenementum*, where, if the defendant proves he has a single acre in the vill, the issue is with him, whatever quantity of land the plaintiff may have there, and if the plaintiff had meant to dispute the particular spot, he should have newly assigned." But that decision has since been completely overturned by the decision of this court, in *Cocker v. Crompton*, 1 B. & C. 489, in which it was held that where, in trespass *quare clausum fregit*, the plaintiff names the close in his declaration, and the defendant pleads, *liberum tenementum*, generally, without giving any further description of the close, the plaintiff is not driven to a new assignment; but is entitled to recover upon proving a trespass done in a close in his possession, bearing the name given in the declaration, although the defendant may have a close in the same parish known by the same name. They also cited *Stevens v. Whistler*, 11 East, 51, as showing that where "a plaintiff is entitled to part of a close trespassed on, he may declare for trespasses in the close generally, and the plaintiff should plead *liberum tenementum*, if it is meant to drive him to confine the trespasses to that part of the close which is his."

ABBOTT, C. J. I am of opinion that this rule must be discharged. It is impossible to say upon the evidence, and the finding of the jury, that this rule ought to be made absolute, unless from the peculiar form of the issue, the plaintiff be entitled to a verdict, provided any part of the garden were enclosed within thirty years. The case of *Cocker v. Crompton* has been relied upon by the plaintiff, to show that he is entitled upon these pleadings to have the verdict entered for him; that was trespass for breaking and entering the plaintiff's close, called the Fold Yard, and the defendant pleaded, that the case in which, &c., was his soil and freehold, and upon that issue was joined. The question upon that issue was, whether the close described in the declaration as the close of the plaintiff, called the Fold Yard, was the defendant's freehold, and it was properly held that the plaintiff entitled himself to recover, by proving a trespass done in a close in his possession, bearing the name of the Fold Yard, although the defendant had a close in the same parish, known by the same name. But I am of opinion, that upon these pleadings the plaintiff did not entitle himself to a verdict, by proving that a part of the garden called Burgey Cleave Garden, had been enclosed and held in severalty adversely for thirty years. The replication alleges, that the close in which, &c., in the declaration mentioned, is a certain close called Burgey Cleave Garden, and that for thirty years and more it had been separated from the common, &c.; the words, "the close in which, &c., in the declaration mentioned," confines that allegation to that spot where the trespass was committed; then it becomes a question of fact, whether

the trespass was committed in that part of Burgey Cleve Garden, which had been enclosed and enjoyed in severalty for upwards of thirty years. That question has been submitted to the jury, and they have found that the trespass was not committed in any part of Burgey Cleve Garden, which had been enclosed and held in severalty for thirty years; it was, therefore, made out in proof, that the place in which the trespass was committed had not been occupied and enjoyed during the time, in the replication mentioned, in severalty or adversely, and that being so, the verdict is properly entered for the defendant.

BAYLEY, J. It appears from the evidence, that Burgey Cleve Garden consisted partly of land which had been enclosed upwards of thirty years, and partly of land which had not been enclosed so long. The name of Burgey Cleve Garden attached on each part of the enclosure, and it is contended that the pleadings are so framed, as to entitle the plaintiff to a verdict, by proving that the trespass was committed on either part of the enclosure. The jury, by their verdict, have found that the trespass was committed in that part of the land which had not been enclosed thirty years. Then the point to be considered is, what question of fact do these pleadings raise? The defendant pleads, that he had a right of common over Frontishoe Down, of which the closes in which, &c., until the wrongful separation thereof, were parcel, and then justifies the breaking and entering the closes, because the closes in which, &c., were wrongfully enclosed from the down. The plaintiff, in his replication, as to the trespass committed in one of the closes, enters a nolle prosequi; and as to the trespass committed in the other close, says, that the last-mentioned close in the declaration mentioned, in which, &c., (viz., in which the trespass was committed,) was a close known by the name of Burgey Cleve Garden, and that the same close, in which, &c., had for thirty years and more been enclosed from the common, and occupied and enjoyed in severalty, without any exercise of any right of common of pasture. The defendant rejoins, that the last-mentioned close, in which, &c., (viz., where the trespass was committed,) had not been, and was not, occupied or enjoyed during the time mentioned in the declaration, in severalty or adversely to E. Foss, and without the exercise and enjoyment of a right of common of pasture, during the time in the plea mentioned. When the plaintiff, therefore, in his replication, or the defendant in his rejoinder, speak of Burgey Cleve Garden, they are speaking of the close in which the trespass was committed, and that being so, the pleadings raise this question of fact, whether that part of Burgey Cleve Garden, in which the trespass was committed, had been enclosed and occupied, or enjoyed for thirty years, in severalty or adversely, to E. Foss, &c. Now, if the jury had found specially in this case, that a close, containing two acres, was called Burgey Cleve Garden, and that the trespass was committed in one acre, and that that acre had not been occupied and enjoyed for thirty years, in severalty, it is quite clear that the verdict must have been entered for the defendant, because it would be wholly immaterial whether the other part of Burgey Cleve Garden had been held in severalty thirty years or not. Now, in this case the jury have found a trespass to have been committed only in that part of the close which had not been enclosed thirty years. They have therefore found in effect, that the place where the trespass was committed had not been enclosed and held in severalty upwards of thirty years, and that being so the verdict is properly entered for the defendant.

HOLROYD, J. I am of opinion that there is no ground for disturbing this verdict. It appears clearly from the evidence, and from the finding of the jury, that the trespass was committed in that part of Burgey Cleve Garden which had not been enclosed and held in severalty for thirty years. Upon the merits, therefore, the defendant is entitled to a verdict, unless he is fettered by the peculiar form of the pleadings. Now, the allegation in the replication, that the

close in which, &c., was a close called by the name of Burgey Cleve Garden, may be considered either as an entire allegation, including the whole of Burgey Cleve Garden, or a divisible allegation, confined to that part of Burgey Cleve Garden in which the trespass was committed. It is clear that it must be taken to include that spot upon which the trespass was committed, for otherwise the replication would be bad. Now, if the allegation extends to the whole of Burgey Cleve Garden, then the plaintiff has alleged in pleading, and was bound to prove that the whole of Burgey Cleve Garden had been enjoyed and held in severalty for thirty years. If it be a divisible allegation, and confined to that part in which the trespass was committed, then it raised a question of fact for the jury, upon the evidence whether that part of the garden, in which the trespass was committed, had been occupied and enjoyed for thirty years, in severalty, *as alleged in the rejoinder. It seems to me that the allegation is divisible, [*926 and that the verdict has been properly found for the defendant on that issue, although, perhaps, in strictness, the plaintiff was entitled to have the verdict found for him on the plea of not guilty. That however, would be useless; because the defendant would be entitled to judgment on the whole record, the special plea being an answer to the action. If the issue extends to the whole close, the more correct finding would have been, that part of the close had not been enclosed for thirty years, and that the trespass had been committed in that part, and then judgment would have been given for the defendant, notwithstanding the verdict for the plaintiff on the general issue. Upon the whole, I think that the verdict was properly found for the defendant, because the trespasses were not committed on that part of Burgey Cleve Garden which had been enclosed and enjoyed in severalty for thirty years.

Rule discharged.

DOE, on the joint and several Demises of THOMAS HERBERT, JAMES SOUTHERN and ANN his Wife, and WILLIAM DUKE, v. JOHN SELBY.

Devise "to testator's son G. for life, and from and after his decease unto all and every the child and children of G. lawfully to be begotten, and their heirs for ever, to hold as tenants in common, and not as joint-tenants; but if my son G. should die without issue, or leaving issue, and such child or children should die before obtaining the age of twenty-one years, or without lawful issue, then I give and devise the same estates unto my son T., my daughter A. S., and my son-in-law W. D., and to their heirs for ever, as tenants in common, and not as joint-tenants." After testator's death, G. suffered a recovery, and died unmarried and without issue: *Held*, that in that event the devise over must take effect as a contingent remainder, and was therefore defeated by the destruction of the particular estate by the recovery.

EJECTMENT, for messuages and premises in the parish of St. Leonard's, Shore-ditch, in the county of Middlesex. The declaration contained counts, first on *a demise of the entirety by Thomas Herbert, James Southern, and Ann [*927 his wife (in right of the said Ann,) and William Duke, the 1st of January, 1821; secondly, on the demise of an undivided third by Thomas Herbert, same day; thirdly, on the demise of an undivided third third by James Southern and Ann his wife (in right of the said Ann,) same day; fourthly, on the demise of an undivided third, by William Duke, same day. Plea, general issue. At the trial before ABBOTT, C. J., at the Middlesex sittings after last Easter term, a verdict was found for the plaintiff, subject to the opinion of the court, on the following case:

Thomas Herbert being seised in fee of the premises in question, made his will, duly executed and attested, so as to pass real estates, containing as follows, *inter alia*. "I give and devise unto my said son, George Herbert, two freehold houses in Burdett's-buildings, Hoxton, in the parish of St. Leonard's, Shore

ditch, aforesaid, in the occupation of William Ames and Tabitha Kenner, also, &c., (certain other premises particularly described in the will,) to hold to him, my said son George, for and during the term of his natural life; and from and after his decease, I give and devise the same estates unto all and every the child and children of my said son George, lawfully to be begotten, and their heirs forever, to hold as tenants in common and not as joint-tenants. But if my said son George should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue; then I give and devise the same estates unto my said son Thomas, my daughter Ann Southern, and my son-in-law, William Duke, and their heirs for ever, to hold as tenants in common, and not as joint-tenants." After *928] the "death of the testator George Herbert suffered a recovery to the use of himself in fee, and afterwards by lease and release conveyed the premises to the defendant in fee. In January, 1818, the said George Herbert died unmarried without having had issue, leaving the said Thomas Herbert, Ann Southern, then and still the wife of the said James Southern, and William Duke, named in the said will, him surviving.

Chitty for the plaintiff. It was manifestly the intention of the testator, that his son George should take an estate for life only; and that if he had not any children, or none that should arrive at an age when they would by law be capable of conveying away the estate, it should go to the lessors of the plaintiff. It will be contended on the other side, that the ultimate remainder was contingent, and therefore defeated by the destruction of the particular estate. But that is not so, for either the estate given to G.'s children was an estate tail, in which case the ultimate remainder would be vested, or it was a contingent fee determinable, and the limitation over must take effect as an executory devise, according to *Gulliver v. Wickett*, 1 Wils. 105, which is confirmed by the observations in *Fearne on Executory Devises*, 396, sixth edit. In either case, the destruction of the life estate of George would not destroy the remainder, and the lessors of the plaintiff are entitled to the estate. Here, even if the first contingency happened, viz., that George died leaving a child, yet if that child died under twenty-one without issue, the devise to the lessors of the plaintiff *929] would take effect; it could not therefore be a contingent remainder, *but must be an executory devise, *Pells v. Brown*, Cro. Jac. 590; *Doe v. Webber*, 1 B. & A. 713. But, secondly, it may be contended that the children of George would take an estate tail, for although the devise is to them and their heirs for ever, yet as the estate is afterwards devised over in the event of their dying without issue, that reduces their interest to an estate tail, *Doe v. Reason*, cited in *Doe v. Holmes*, 3 Wils. 244. Besides, as the ultimate remainder is to persons who would be heirs general to the children, they would never die without heirs as long as those persons lived. This case is therefore different from *Loddington v. Kime*, 3 Lev. 431, and *Goodright v. Dunham*, 1 Doug. 264. [BAYLEY, J. But here you must read the devise, "if the children should die before twenty-one, and without issue," otherwise the remainder over will be too remote.]

Campbell, contra, was stopped by the court.

BAYLEY, J. There are two modern cases which are quite decisive of the present question, *Doe v. Burnsall*, 6 T. R. 30, and *Crump v. Norwood*, 7 Taunt. 362. The present question arises upon a will, whereby the property was given to the testator's son, George Herbert, for life, and from and after his decease, to all and every the child and children of George and their heirs for ever; but if George should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without *930] lawful issue, then to the lessors of the plaintiff, two of *whom were children of the testator. It is not contended that George took an estate

tail; and, indeed, *Goodright v. Dunham* clearly shows that he took for life only, and that his children would take as purchasers by way of remainder, and they would take in fee. It has been contended, that the ultimate devisees took either by way of executory devise or vested remainder. But it is clear, that where a devise may operate as a contingent remainder, it cannot be considered as an executory devise. If a fee be given by way of vested limitation, but determinable, a remainder after that must be an executory devise; but if a fee is limited in contingency, and upon failure of that the estate is given over, that is a contingency with a double aspect; and if the estate vests in the one, it cannot in the other, *Loddington v. Kime*. But it may happen, that an estate may be devised over in either of two events; and that in one event the devise may operate as a contingent remainder, in the other as an executory devise. Thus if George had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder. *Gulliver v. Wickett* was clearly a case of executory devise. The estate was given to testator's wife for life, and after her death to such child as she was then supposed to be enceint with, and to the heirs of such child for ever; provided, that if such child shall die before twenty-one, leaving no issue of its body, then the reversion over. The description of the child there was a clear designation personæ, and as a child in ventre sa mere is for many purposes considered as in esse, the first remainder, a fee *determinable was vested in that child, [*931 and the remainder over could only operate by way of executory devise. The other cases which I have mentioned are not in substance distinguishable from this; *Doe v. Burnsall* was a devise to Mary Owstwhick, and the issue of her body as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one, and without leaving any lawful issue of their bodies, then over. Mary Owstwhick suffered a recovery, and died without having had any issue, and it was held that all the limitations subsequent to that to her were contingent, and destroyed by the recovery. No question was raised as to ultimate remainder operating by way of executory devise, but that could not be raised, as Mary Owstwhick never had any issue in whom the first remainder might vest. But *Crump dem. Woolley v. Norwood* is on all fours with the present case. There the devise was to the testator's wife for life, if she should so long remain unmarried, and immediately after her decease or marriage, to testator's three nephews, share and share alike, for life, as tenants in common, remainder to the heirs of their bodies respectively in fee; if more than one, then to all equally, as tenants in common; "and if any of his said nephews should die, leaving no such issue, or leaving any such they should all die without attaining the age of twenty-one years, then over;" and it was held, that the remainders, subsequent to the devise to the nephews, were contingent, and defeated by the destruction of the particular estate. And one of the nephews having died without having had issue, GIBBS, C. J., considered that in that event the question of executory devise did not arise; although if there had been issue, *the ultimate devise over might have operated in that mode. These authorities satisfy me, that in the event which has [*932 happened, the devise to the lessors of the plaintiff in this case did not operate by way of executory devise. It has been argued, that it might operate as a vested remainder, for that the devise to George's children was only of an estate tail, because they could never die without heirs as long as the lessors of the plaintiff lived, and, therefore, "heirs" must mean "heirs of the body." But although it may be so where, after a devise to a man and his heirs the estate is devised over simpliciter to a collateral heir, yet it is not so where the limitation over depends upon the party dying within a limited time. Upon the

whole, I am of opinion that George Herbert took an estate for life only, and that his children, if there had been any, would have taken a fee; but in the event of there not being any, which is the event that has happened, the remainder over was given by way of contingent remainder, and was defeated by the destruction of the particular estate. Our judgment must, therefore, be for the defendant.

HOLROYD, J. Under the will in question George took an estate for life, and his children in fee. In the event of his having no children, the devise over would operate as a contingent remainder: but if he had children, then it could only take effect as an executory devise. That it was not an executory devise, in the event that has happened, is clearly proved by the cases which my brother BAYLEY has cited; and the language of GIBBS, C. J., in *Crump v. Norwood*, is peculiarly applicable. Here the estate is given over on either of two contingencies, one of them George's dying without children; that has happened, and upon that the remainder over would, if at all, take effect as a contingent remainder. But the particular estate having been previously destroyed, the contingent remainder was thereby defeated.

LITLEDALE, J. The principles applicable to this case were fully considered in *Crump v. Norwood*, which cannot be distinguished from it. *Doe v. Burnall* is also in point. It is true, that in that case the words were "if all such issue should die under twenty-one and without issue;" but here the word *or* must be read *and*; and although the point of the executory devise was not there agitated, yet GIBBS, C. J., thought it an express authority for his judgment in *Crump v. Norwood*, where it was raised. Upon these authorities it seems to me clear, that the lessors of the plaintiff cannot recover.

Judgment for the defendant.(a)

(a) See *Hasker v. Sutton*, 1 Bing. 500.

It was afterwards discovered that Thomas Herbert was heir at law of the testator, and a fresh ejectment was brought, the court having refused to grant a new trial in this case.

*934]

HANNAM v. MOCKETT.

Declaration stated that plaintiff was possessed of a close of land with trees growing thereon, to which rooks had been used to resort and to settle, and build nests and rear their young in the trees, by reason whereof plaintiff had been used to kill and take the rooks and the young thereof, and great profit and advantages had accrued to him, yet that defendant wrongfully and maliciously intending to injure the plaintiff, and alarm and drive away the rooks, and to cause them to forsake the trees of the plaintiff, wrongfully and injuriously caused guns loaded with gunpowder to be discharged near the plaintiff's close, and thereby disturbed and drove away the rooks, whereby the plaintiff was prevented from killing the rooks and taking the young thereof. Plea, not guilty: Held, on motion in arrest of judgment, that this action was not maintainable, inasmuch as rooks were a species of birds fera nature, destructive in their habits, not known as an article of food or alleged so to be, and not protected by any act of parliament, and the plaintiff could not therefore have any property in them, or show any right to have them resort to his trees.

DECLARATION stated, that the plaintiff, before and at the time of the committing of the several grievances by the defendant, thereafter mentioned, was, and still is, lawfully possessed of a certain close of land, with certain trees growing and being thereon, situate, &c., to which said close and trees, so growing and being thereon, divers great numbers of rooks had been and were used and accustomed to resort and come, and to settle, build nests, breed, and rear their young in and upon the said trees, by means whereof the plaintiff had been and was used and accustomed to kill and take divers great quantities of the said rooks, and the young thereof, and thereby divers great profits and advantages had accrued, and still ought to accrue to him, to wit, at, &c. Yet that the defendant, well knowing, &c., but contriving, and wrongfully and maliciously intending, to injure the plaintiff, and to alarm, affright, and drive away the said rooks,

and to cause them to forsake and abandon the said trees of the plaintiff, and their nests built therein; and to prevent other rooks from resorting thereto, and settling in and upon the said trees, and to deprive the plaintiff of the profits and advantages so arising from the said rooks, and the *young thereof as aforesaid, did theretofore, to wit, on, &c., at, &c., and on divers other days and times, between, &c., wrongfully and unjustly cause divers guns, loaded with gunpowder, to be discharged near to the said close of the plaintiff, and with the noise of the discharges of the said guns, and the smell of the said gunpowder, did disturb, terrify, and drive away divers rooks, then being in or near the said close and trees of the plaintiff, insomuch that divers, to wit, 1000 rooks, which before that time had been used and accustomed to resort and come to the said trees, and to settle, build nests, breed and rear young in and upon the said trees, flew away and abandoned the said close and trees, and the nests built therein, and wholly forsook the same: and divers, to wit, 1000 other rooks which were then about to resort to, and settle in and upon, the said close and trees, were thereby prevented from so doing; whereby the plaintiff hath been from thence, hitherto, and still is prevented from killing and taking rooks, and the young thereof, in such plenty as he otherwise might and would have done, and thereby the plaintiff hath lost and been deprived of the profits and advantages which might, and otherwise would, have accrued to him therefrom, to wit, at, &c. Second count, that the plaintiff was possessed of a certain dwelling-house, and certain closes of land adjacent thereto, with a certain vivary, called a rookery, in and upon one of the said last-mentioned closes, situate, &c., to which said rookery divers great numbers of other rooks had been, and were used and accustomed to resort and come, and to build nests, abide, breed, and rear their young in the said rookery, by means whereof the plaintiff was used and accustomed to derive great profit and advantage from killing and taking the *said last-mentioned rooks, and the young thereof; and the said rookery was ornamental and advantageous to the said dwelling-house and closes of the plaintiff, and afforded great satisfaction and delight to the plaintiff, to wit, at, &c.: yet the defendant, well knowing the premises, but contriving, and maliciously intending to injure and aggrieve the plaintiff, theretofore, to wit, on, &c., at, &c., and on divers other days, &c., to wit, in, &c., wrongfully and unjustly caused divers other guns, loaded with gunpowder, to be discharged near to the said rookery of the plaintiff, and with the noises of the discharges of the last-mentioned guns and gunpowder, did disturb and terrify divers rooks, then being in or near the said rookery, insomuch, that divers, to wit, 1000 of the last-mentioned rooks which had before that time been used and accustomed to resort and come to the said rookery, and build nests, abide, breed, and rear their young in the said rookery, then and there flew away, and wholly forsook and abandoned the said rookery, and divers, to wit, 1000 other rooks, which were then about to resort to, and settle in, the said rookery, were thereby prevented from so doing, to wit, at, &c., by means whereof the plaintiff was, and still is, deprived not only of the satisfaction and delight, but also of the profits and advantages which might, and otherwise would, have accrued to him therefrom, and the plaintiff had been otherwise greatly injured and damnified, to wit, at, &c. To the plaintiff's damage of 200*l*. Plea not guilty. A general verdict having been found for the plaintiff, with 10*l*. damages, a rule nisi, for arresting the judgment, was obtained in last Michaelmas term. The case was argued by *Bolland*, in support of the rule, and *Adolphus* contra, partly at the *sittings in bank after Hilary term, and partly at these sittings. All the arguments and authorities cited are so fully considered and commented on in the judgment of the court, that it is unnecessary to state them here.

Cur. ado. vult.

BAYLEY, J., now delivered the judgment of the court, and after stating the

pleadings proceeded as follows: The judgment in this case must be arrested if either of the counts is bad, because the damages have been taken generally on the whole declaration; but there does not appear to be any material difference between them. The plaintiff does not state any special right in him to have the rooks resort to his trees; he relies upon that general right which all the king's subjects have, and he describes the profit to arise to him, not from the eggs, but from killing the birds and their young. To maintain an action, the plaintiff must have had a right, and the defendant must have done a wrong. A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. The injury in this case does not affect any right of personal security or personal liberty, nor any property in possession or in action; and the question then is, whether there is any injury to any property the plaintiff had a special right to acquire. A man in trade has a right in his fair chances of profit, and he gives up time and capital to obtain it. It is for the good of the public that he should. But has it ever been held that a man has a right in the chance of obtaining animals *feræ naturæ*, where he is at no expense in enticing them to his premises, and

*938] where it may be at least questionable whether they will be of any *service to him, and whether, indeed, they will not be a nuisance to the neighbourhood? This is not a claim *propter impotentiam* because they are young, *propter solum* because they are on the plaintiff's land, or *propter industriam* because the plaintiff has brought them to the place or reclaimed them, but *propter usum et consuetudinem* of the birds.^(a) They, of their own choice, and without any expenditure or trouble on his part, have a predilection for his trees and are disposed to resort to them. But has he a legal right to insist that they shall be permitted to do so? Allow the right as to these birds, and how can it be denied as to all others? In considering a claim of this kind, the nature and properties of the birds are not immaterial. The law makes a distinction between animals fitted for food and those which are not; between those which are destructive to private property and those which are not; between those which have received protection by common law or by statute and those which have not. It is not alleged in this declaration that these rooks were fit for food; and we know in fact that they are not generally so used. So far from being protected by law, they have been looked upon by the legislature as destructive in their nature, and as nuisances to the neighbourhood where they are. That being so, surely a party can have no right to have them resort to his lands, to the injury of his neighbours; and, consequently, no action can be maintainable against a person who prevents their so doing. It has been said, that a man may acquire rights over other animals *similis naturæ*, as affording him diversion, such as rabbits in a warren, or doves in a dove-cote. But first it is to be observed, that rabbits and pigeons are not only *subjects of diversion, but

*939] constitute an article of food. In 2 Inst. 199, it is said, that the common law gave no way to matters of pleasure (wherein most men do exceed,) for that they brought no profit to the commonwealth; and therefore it is not lawful for any man to erect a *park, chase, or warren*, without a license under the great seal of the king, who is *pater patriæ* and the head of the commonwealth:" but in the same page it is said "that fish-ponds being a matter of *profit and increase of victuals*, any man may erect." And even with respect to animals *feræ naturæ*, though they be fit for food, such as rabbits, a man has no right of property in them. In *Boulston's case*, 5 Co. 105. Eliz. 547, it was adjudged that if a man makes coney-burrows in his own land, which increase in so great number that they destroy his neighbour's land, his neighbours cannot have an action on the

(a) See the case of the *Swans*, 7 Co. 86.

ease against him who made the said coney-burrows ; for so soon as the coney come on his neighbour's land, he may kill them, for they are *feræ naturæ*, and he who makes the coney-burrows *has no property in them*, and he shall not be punished for the damage which the coney do in which he has no property, and which the other may lawfully kill ; and WALMSLEY, J., says, " that the property of the coney is not in any man, nor can any man so keep them but that they will break out of themselves, which is the reason that none can have them in his own land, unless *by grant from the king or by prescription* ; if otherwise, he is punishable in a quo warranto, for the queen had the royalty in such things, whereof none can have any property." Manwood in his Forest Law, p. 148, ss. 43, 44, takes notice of this power. It is stated to *have been further resolved in that case, " that none may erect a dove-cote but [940 the lord of a manor, and if any do it, he may be punished in the leet, but no action on the case lies by any particular man against him who erects it." This resolution, as to the dove-cote being a common nuisance, was held not law, in *Dewell v. Sanders*, Cro. Jac. 490 ; there it was expressly decided, that the erecting of a dove-cote by the freeholder of a manor was not a common nuisance, nor inquirable at the leet ; but if the pigeons fly abroad to the damage of the king's subjects, the judges of assize may take cognisance of it, because it could not be a nuisance, but to those only whose corn they eat, and not to all persons ; for if it were a common nuisance, *neither the lord of a manor nor the parson could erect a dove-house more than any other freeholder* ; for none can prescribe to make a common nuisance ; for it cannot have a lawful beginning, by license or otherwise, being an offence against the common law ; and therefore they held the opinion in *Boulston's* case to be no law. And it was said that the law protected and favoured dove-cotes ; and therefore the erecting of them could not be a nuisance ; for a dove-cote was demandable in a præcipe, and an account lay for it ; and MONTAGUE said, that the erecting of a dove-cote of itself was not a nuisance, but the storing of it with pigeons, and suffering them to fly abroad into the country, which is out of the leet." The court there took the sound distinction, that the erecting of a dove-cote was not a common nuisance, but that an individual might sustain a private injury from the doves, and that was cognisable before the justices in eyre. It is observable, also, that dove-cotes are protected by several statutes, *which are referred to in [941 that case. In the course of the argument, DODDRIDGE, J., says, " that if pigeons come upon my land I may kill them, and the owner has not any remedy, provided they be not taken by any means prohibited by the statute." And to this CROKE and HOUGHTON, Js., agreed ; but MONTAGUE, C. J., " held that the party had *jus proprietatis* in them, for they are as domestics, and have *animus revertendi*, and ought not to be killed, and for the killing of them an action lies ;" but the reporter adds, the other opinion is the best. Trespass will lie for breaking a dove-cote ; and in *Arnold v. Jefferson*, 3 Salk. 248, it is said, " that a lord of a manor may erect a dove-cote upon his land, parcel of his manor, and this he may do by virtue of his right as lord thereof ; but that a tenant cannot without license, for he can have no right to any privilege which may be prejudicial to others ; but this is not a common nuisance, nor punishable in the leet. But the nuisance being particular, the lord shall have an action on the case, or an assize of nuisance, as he may for building a house to the nuisance of his mill." These authorities show, that with respect to rabbits and doves, which may be injurious to the lands of others, generally speaking, a party has not a right to keep them even in his own lands, except by the king's license, or unless he can show a title by prescription, which supposes a grant. The reason given for requiring the grant is, that such animals are *nulius in bonis*, and no man can appropriate them to himself, (a) and for the same

(a) See case of *Monopolies*, 11 Co. 87.

reason, none can make a park, chase, or warren without the king's license. That being the law with respect to birds and animals whose habits are less destructive than those of *rooks, it may be fit now to consider in what light the

*942] law looks upon birds of this latter description, and it will appear that they are considered nuisances to the neighbourhood where they resort. The stat. 24 H. 8, c. 10, entitled "an act to destroy choughs, crows, or rooks," recites that they destroy great quantities of corn, as well in the sowing as at the ripening and kerneling thereof, that they make a marvellous destruction of the covertures of thatched houses, barns, ricks, stocks, and other such like; so that if they be suffered to breed as in certain years past, they will be the cause of great destruction of corn and grain, to the great prejudice of the tillers and sowers of the earth: and it enacts, that every person having any lands, &c., in his own occupation, shall do as much as in him lies to kill and utterly destroy all choughs, crows, and rooks, coming, abiding, breeding, or haunting on the said lands, on pain of a grievous americiament. By sect. 2, the inhabitants of every parish shall, for ten years, provide and set nets for choughs, crows, and rooks, on pain to forfeit 10s. every lawful day such nets shall be wanting. By sect. 3, the tenants are for ten years yearly to assemble and survey the houses, &c., and conclude by what means it shall be best possible to destroy all the young brood of the choughs, crows, and rooks for the year, on pain to forfeit 20s. every year they shall omit to assemble. By sect. 5, "any person minding to destroy the said choughs, crows, and rooks, may, after request to the owner or occupier where they haunt or breed, enter and carry away all such rooks, &c., as he shall take the same day without let by the owner or occupier." The 25 H. 8, c. 11, is not very material, but it is still in force. In that the word *rooks* is omitted, whether intentionally or not it is immaterial to inquire. The 8 Eliz. c. 15,

*943] *revives the provisions in the 24 H. 8, c. 10, as to the keeping of nets for choughs, crows, or rooks, but repeals all the other branches of that statute. It also provided, that in every parish sums should be raised for the destruction of noyful fowl and vermin: and for the heads of three old crows, choughs, pies, or rooks, or of six young ones, or for six eggs, is to be given a penny, and different sums for other different things. This statute was temporary, and was suffered to expire, but it was not repealed. It is not to be concluded, therefore, that the legislature altered their opinion as to the nature of these birds, and they may now be considered to be of the description the statutes 24 H. 8, c. 10, and 8 Eliz. c. 15, give them, viz., birds of destruction, and noyful fowl. It is not alleged upon this declaration that rooks are an article of food. At all events they are not so much so as rabbits. They certainly answer the description of animals *feræ naturæ*. They are not protected by any statute, but on the contrary have been declared by the legislature to be a nuisance to the neighbourhood where they are. That being so, it is quite clear no person can claim a right to have them resort to his lands, nor can any person become a wrong-doer by preventing their so doing. *Keeble v. Hickeringill*, 11 East, 574, n., bears a stronger resemblance to the present than any other case, but it is distinguishable. There it was decided, that an action on the case lies for discharging guns near the decoy-pond of another, with design to damnify the owner by frightening away the wild fowl resorting thereto, by which the wild fowl are frightened away and the owner damnified. But in the first place it is observable, that wild fowl are protected by the statute 25 H. 8, c.

*944] 11; that they constitute a known article of food, and that a person keeping up a decoy expends money and employs skill in taking that which is of use to the public. It is a profitable mode of employing his land, and was considered by Lord Holt as a description of trade. That case, therefore, stands on a different foundation from this. All the other instances which were referred to in the argument on the part of the plaintiff, are cases of ani-

imals specially protected by acts of parliament, or which are clearly the subject of property. Thus hawks, falcons, swans, partridges, pheasants, pigeons, wild ducks, mallards, teals, widgeons, wild geese, black game, red game, bustards, and herons, are all recognised by different statutes as entitled to protection, and, consequently, in the eye of the law, are fit to be preserved. Bees are property, and are the subject of larceny. Fisheries are totally different. The fish can do no harm to any one, and constitute a well-known article of food. Upon the ground, therefore, that the plaintiff had no property in these rooks, that they are birds *feræ naturæ*, destructive in their habits, and not protected either by common law or statute, and that the plaintiff is at no expense with regard to them, we are of opinion that the plaintiff had no right to insist upon having them in his neighbourhood, and that he cannot maintain this action. The rule for arresting the judgment must therefore be made absolute.

Rule absolute.

*KENWORTHY v. SCHOFIELD.

[*945

At a sale of goods by auction, certain conditions of sale were read before the biddings commenced, but were not attached to the catalogue. An agent for the defendant was the highest bidder for a lot, and the auctioneer put down the price 105*l.*, and the agent's name opposite that lot, in his catalogue: *Held*, that sales of goods by auction are within the 29 Car. 2, c. 3, s. 17, and that no sufficient memorandum of the bargain was signed to satisfy that section, the conditions of sale not being annexed to the catalogue. Had they been annexed, it would have sufficed to put down the agent's name, that of his principal not being necessary.

SPECIAL assumpsit against the defendant, for not taking away a carding engine, purchased by him at an auction, agreeable to the conditions of sale, (which were set out,) in consequence whereof it was resold at a loss. Plea, non-assumpsit. At the trial before HOLROYD, J., at the Lancaster Summer assizes, 1823, it appeared that the engine in question was put up to sale by auction, among a variety of other things; the sale was subject to certain conditions, which were read by the auctioneer before the biddings commenced, but they were not attached to the catalogue or referred to by it. One Luke Winterbottom, as agent for the defendant, was the highest bidder for the engine, and it was knocked down to him, and the auctioneer wrote his name and the price, 105*l.*, against that article in the catalogue. For the defendant it was objected, first, that the statute of frauds was not satisfied by writing down the name of the agent of the purchaser: secondly, that the conditions of sale were part of the bargain, and not being annexed to the catalogue the signature to the latter did not amount to a signature of a note or memorandum of the bargain, within the meaning of the 17th section of 29 Car. 2, c. 3. The learned judge overruled the first objection, but reserved the second point, and the plaintiff having obtained a verdict, *Cross*, Serjt., in Michaelmas term, obtained a rule nisi for a nonsuit or a new trial; against which

J. Williams now showed cause. The second question now before the court is certainly very important, as it respects the validity of all sales by auction. The first objection was overruled at the trial, and it appears by **Phillimore v. Barry*, 1 Campb. 513, that where an authorized agent bids at a sale, it is sufficient to put down his name; it is not necessary that the name of the principal should be then declared. The second question depends upon Lord ELLENBOROUGH's dictum in *Hinde v. Whitehouse*, 7 East, 558. But that case was not decided on the ground that the memorandum was insufficient; the court considered that there had been a delivery and acceptance of part of the goods, in the name of the whole, the other question therefore became unimportant. Suppose conditions of sale to be attached to a catalogue at first, but to be separated during the progress of the sale, will the sale of the

lots previously knocked down be good, and of the rest bad? Surely, the reading of the conditions before the sale was sufficient to connect them with the biddings that afterwards took place. Perhaps it is too late to contend, that auctions of goods are not within the 29 Car. 2, c. 3, although it appears by what fell from three of the learned judges, in *Hinde v. Whitehouse*, they did not concur in shaking the authority of *Simon v. Motivos*, 3 Burr. 1921, where it was doubted whether such sales fell within the operation of the statute,

Cross, Serjt., (with whom was *Starkie*.) contra. There was not any evidence to show that the defendant or his agent heard the conditions read; no proof was given of his being in any way conusant of them. They were not referred to by the catalogue. The mere signature of that was not then the signature of a note or memorandum of the bargain, within the meaning of the 29 Car. 2, c. 3, s. 17. In *Hinde v. Whitehouse* the point was expressly brought under consideration. (He was then stopped by the court.)

*947] *BAYLEY, J.* It has been decided by many cases, that in sales of land by auction the auctioneer is agent for both the vendor and vendee, and that such auctions are within the statute of frauds. *Walker v. Constable*, 1 B. & P. 306; *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; *Kemey's v. Proctor*, 3 V. & B. 57. Now, the language of the seventeenth section of the statute of frauds, relating to sales of goods, is in substance the same as that of the fourth section, relating to sales of land. The only difference being, that the latter speaks of an *agreement*, the former of a *bargain*. The word *bargain* means the terms upon which parties contract, and it appears by *Saunderson v. Jackson*, 2 B. & P. 238, that in order to satisfy the statute the signature must either be to some written document, containing in itself the terms of the bargain, or connected with some other document which does. Then comes *Hinde v. Whitehouse*, in which Lord ELLENBOROUGH, after time taken for consideration, delivered it as his opinion, that an auctioneer had not satisfied the requisitions of the statute by signing the name of the purchaser to the catalogue, that not being connected with, or referring to, the conditions of sale. In the present case nothing was said at the time when the engine was put up, as to the terms upon which the sale was to proceed. The very mischief contemplated by the statute might occur in such a case as this. There is abundant room for fraud and perjury, respecting the conditions of sale. Inasmuch, therefore, as there was not any memorandum of the terms of the bargain, signed by the parties, I think that the case is within the 29 Car. 2, c. 3, s. 17, and that a nonsuit must be entered.

*948] *HOLROYD, J.* Upon the trial of this case two objections were made. First, that the defendant's name was not put down by the auctioneer. I thought there was no weight in that, and still continue of the same opinion. (a) The other objection was reserved, and upon the authority of *Hinde v. Whitehouse*, I both think that auctions of goods are within the statute of frauds, and that there has not been a signature to a memorandum of the bargain to satisfy the seventeenth section of that act. It appears to me that you cannot call that a memorandum of a bargain which does not contain the terms of it. The argument for the plaintiff is, that the conditions being in the room were virtually attached to the catalogue. But I think that as they were not actually attached or clearly referred to, they formed no part of the thing signed. In the case put of a separation of the conditions from the catalogue, during the progress of the sale, I should say that the signatures to the latter, made after the separation, were unavailing. It occurred to me at first, that this might be likened to the case of a will, consisting of several detached sheets, when a signature of the last, the

(a) See *White v. Proctor*, 4 Taunt. 209.

whole being on the table at the time, would be considered a signing of the whole ; but there the sheet signed is a part of the whole. Here the catalogue was altogether independent of the conditions. I agree, therefore, that this rule for a nonsuit must be made absolute.

Rule absolute.(a)

LITLEDALE, J., was absent.

(a) See *Jackson v. Lowe*, 1 Bing. 9.

END OF EASTER TERM.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

The figures refer to the English folios, which will be found in a bracket at the head of the page, and in the margin of the text.

ABATEMENT.

See PLEADING, 43. PRACTICE, 17.

ACTION ON THE CASE.

1. Where a lease of premises described them as abutting on "an intended way of thirty feet wide;" which was not then set out, and the soil of which was the property of the lessor; and an under lease was granted, describing the premises as "abutting on an intended way," not mentioning the width: *Held*, that the under lessee was entitled to a convenient way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained. The under lease was of premises, "together with all ways thereunto appertaining." A right of way over the original lessor's soil would not pass by those words. Per *Holroyd, J. Harding v. Wilson*, T. 4 G. 4. 96
2. In case for obstructing the plaintiff's ancient windows, it appeared that the plaintiff and defendant had premises adjoining each other; the plaintiff's house was about four feet within the boundary of her premises. Some witnesses had known it for thirty-eight years, and during all that time there had been windows looking towards the adjoining premises. For a long series of years before the defendant purchased them, those premises had belonged to a family living at a distance, and it was not proved that any member of that family had ever seen them, and they had been occupied by the same tenant for the last twenty years. About two years before the action brought, defendant purchased them and built a house, thereby darkening the plaintiff's rooms: *Held*, that the circumstance of plaintiff's house not being at the extremity of her premises, did not affect the question, and that after an enjoyment of thirty-eight years, in the absence of any contradictory evidence, the windows were to be considered as ancient windows, and that plaintiff consequently was entitled to recover. *Cross v. Lewis*, E. 5 G. 4. 686

3. It is a good defence to an action for a malicious arrest, that the defendant, when he caused the plaintiff to be arrested, acted bona fide upon the opinion of a legal adviser of competent skill and ability, and believed that he had a good cause of action against the plaintiff. But where it appeared that the party was influenced by an indirect motive in making the arrest, it was held to be properly left to the jury to consider whether he acted bona fide upon the opinion of his legal adviser, believing that he had a good cause of action. *Ravenga v. Macintosh*, E. 5 G. 4. 693
4. By the general turnpike act, the trustees of roads are authorized to divert, shorten, alter, or improve the course or path of any of the roads under their management; and divert, shorten, vary, alter, and improve the course or path of any roads through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same; and through or over any private lands, tendering or making satisfaction to the owners thereof and persons interested therein, for the damage sustained thereby: *Held*, that under this clause the trustees are authorized to lower hills and raise hollows: *Held*, secondly, that the trustees are not liable to an action for a consequential injury resulting from an act which they are authorized to do. *Boulton v. Crother*, E. 5 G. 4. 703
5. Declaration stated that plaintiff was possessed of a close of land with trees growing thereon, to which rooks had been used to resort and settle, and build nests and rear their young in the trees, by reason whereof plaintiff had been used to kill and take the rooks and the young thereof, and great profit and advantages had accrued to him, yet that defendant, wrongfully and maliciously intending to injure the plaintiff, and alarm and drive away the rooks, and to cause them to forsake the trees of the plaintiff, wrongfully and injuriously caused guns loaded with gunpowder to be discharged near the plaintiff's close, and thereby disturbed and drove away the rooks, whereby the plaintiff was prevented from

killing the rooks and taking the young thereof. Plea, not guilty: *Held*, on motion in arrest of judgment, that this action was not maintainable, inasmuch as rooks were a species of birds *feræ nature*, destructive in their habits, not known as an article of food, or alleged so to be, and not protected by any act of parliament, and the plaintiff could not therefore have any property in them, or show any right to have them resort to his trees. *Hannam v. Mockett*, E. 5 G. 4. 934

ADMINISTRATOR.

A., by means of a misrepresentation, received of B. and several other persons, his tenants, various sums of money, to which he was not entitled. B. applied to him to have the money which he had so paid, returned, saying that he and the other tenants had been induced to pay more than was due. A. replied, that if there was any mistake it should be rectified. *Held*, that this obviated the statute of limitations as to payments made by the other tenants, as well as by B. Plaintiff, an administratrix, after the death of the intestate, made one such wrongful payment as before mentioned, out of the assets: *Held*, that she might recover it in her representative character. *Clark, Administratrix, v. Hougham*, T. 4 G. 4. 149

ADMIRALTY COURT.

The Court of Admiralty have, in a cause of possession, jurisdiction to take a vessel from a mere wrongdoer, and to deliver it to the rightful owner; and, therefore, where it appeared upon a rule nisi for a prohibition to restrain the admiralty court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it appeared that he was registered owner, and that the vessel had wrongfully come into possession of the defendants, and the latter had not pleaded any title, the Court discharged the rule for a prohibition. *In the Matter of Blanshard and Others*, T. 4 G. 4. 244

ADVOWSON.

See SIMONY.

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 13.

AGREEMENT.

See ASSUMPSIT, 5. PARTNERSHIP, 2.

ALIEN.

Children born in the United States of America since the recognition of their independence, of parents born there before that time, and continuing to reside there afterwards, are aliens, and cannot inherit lands in this country. *Doe d. Thomas and Frances Mary, his Wife, v. Acklam*, E. 5 G. 4. 779

ANCIENT LIGHTS.

See ACTION ON THE CASE, 2.

ANNUITY.

1. The memorial of an annuity must contain the Christian name of the subscribing witness to the securities. The initial of the Christian name is not sufficient. *Cheek v. Jeffries*, T. 4 G. 4. 1

2. It was agreed between the grantor of an annuity and the grantee, that the latter should advance a specific sum of money upon annuity, (to yield to the grantee 7 per cent. per annum,) secured upon landed estates, of which the grantor was tenant for life, and that for securing the sum advanced, certain policies of assurance already effected on his life should be assigned to the grantee. The annual premiums of these policies were considerably less than those which would have been payable if new policies had been effected. The amount of the annual sums payable was fixed at a sum composed of 7 per cent. upon the principal sum advanced, and the amount of the annual premiums payable on the policies to be assigned; and in the deed of grant this was stated to be the annuity granted. The policies were assigned by a separate deed, and there was a stipulation in it that they should be reassigned to the grantor whenever he redeemed the annuity. In the memorial, the principal sum advanced was stated to be the consideration paid, and the annuity to be the annual payment reserved by the deed, but the assignment of the policies was not mentioned: *Held*, that it was not necessary to mention the latter deed in the memorial, and that the principal sum advanced was properly stated to be the consideration paid for the annuity. *Morris v. Jones*, T. 4 G. 4. 232

3. In the memorial of an annuity, enrolled pursuant to the 53 G. 3, C. 141, an instrument was described as an assignment of certain leasehold premises. The instrument was, in fact, an underlease: *Held*, that the description given was a sufficient compliance with the statute. *Butler v. Copel*, M. 4 G. 4. 251

4. The annuity act, 53 G. 3, c. 141, applies only to annuities granted for pecuniary consideration, and therefore where, by marriage settlement, 10,000*l.* was to be paid by the father of the wife to trustees upon trust to pay the interest to the husband for life; and the father died without having paid the principal to trustees, and his affairs being embarrassed, and it being uncertain whether there would be sufficient to pay his debts, the husband agreed to accept in lieu of the 10,000*l.*, 5000*l.* and an annuity of 125*l.* payable during his life: it was held, that such annuity granted by the executors of the father did not require to be enrolled by the statute 53 G. 3, c. 141. *Blake v. Attersoll*, E. 5 G. 4. 875

APPEAL.

1. By the eighth section of the general enclosure act, (41 G. 3, c. 109,) when complaints are made against public roads set out by a commissioner, he and a justice are to hear them, and finally direct what is to be done; and by the tenth section, private roads are to be set out, subject to the same provisions as are contained in the eighth section respecting public roads. A private enclosure act, in which the general enclosure act was recited, gave an appeal in all cases, (except as to such acts, determinations, and proceedings of the said commissioner as were by the said recited act, or that act directed to be final, binding, and conclusive.) The commissioner under that act having set out a private road

which was objected to, he and a justice upon hearing the complaint, ordered that the road should be disallowed: *Held*, that the appeal against such order was not taken away, because it was not an order of the commissioner alone, but of him and a justice of peace together; and because the tenth section of the general act does not expressly say that the order of the commissioner shall be final respecting private roads. *The King v. the Justices of the West Riding of Yorkshire*, 14 G. 4. 228

2. By 55 G. 3, c. 51, an appeal is given against a county rate made in fixed proportions invariably adopted for a series of years. *The King v. The Justices of York*, E. 5 G. 4. 771
3. A notice of appeal against overseer's accounts, stated that the appellants objected to certain specified payments alleged in the accounts to have been made to persons specified by name in the notice: *Held*, that the notice was bad, because it did not state the cause and ground of appeal as required by 41 G. 3, c. 23, s. 4.

The attorneys, some days before the appeal was tried, agreed to admit on the trial of the appeal, that the sums objected to were paid to the persons to whom it was alleged in the accounts that they were paid: *Held* that this was not any waiver of the irregularity in the notice, because the consent of the attorneys was not signified in open court. *The King v. Sheard and Another*, E. 5 G. 4. 856

APPROPRIATION.

A bond was given by country bankers to the several persons constituting the firm of a London banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the London bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the London bankers. It was the course of business between the two houses for the London bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the London bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the London bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time: *Held*, that the entries in the books of the London bankers did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it; and therefore that the London bankers, notwithstanding those entries, were entitled

to apply the payments received subsequently to the death of the deceased partner to the debt of the new firm. *Simon and Others v. Ingham and Others*, T. 4 G. 4. 65

ARBITRAMENT.

1. The Declaration stated that the plaintiff and defendant, by articles of agreement, (reciting that several actions, arising out of the same transaction, had been brought and defended by the plaintiff and defendant G. A. and D. A., and that in one of them the assignees of one J. T. a bankrupt recovered against the now plaintiff 2500*l.*, and that disputes existed between the now plaintiff and defendant respecting the value of the goods and stock which each had received from a certain farm, and also concerning the proportion which each was to pay of the said sum of 2500*l.*, according to an agreement entered into between them before the trial, and also concerning the costs of bringing and defending the actions above mentioned.) submitted themselves to the award of J. T., J. R. and T. C., respecting the said matters. That the arbitrators taking the said matters into consideration, awarded that the defendant should pay the plaintiff 444*l.*; that five-eighths parts of the costs of the several actions before mentioned should be paid by the plaintiff, and three-eighths by the defendant; that the sums already expended by either of them should be allowed as part payment of his proportion; and that when the sum of 444*l.* and the costs were paid, mutual releases should be given. On demurrer: *Held*, that the plaintiff was entitled to recover: for that as to the first part of the award, nothing appeared on the declaration to show that the arbitrators had not awarded the sum of 444*l.* after taking into consideration the value of the stock and goods, and that it was sufficiently certain; for the plaintiff being originally liable to pay the whole sum of 2500*l.* must remain liable to pay all but the 444*l.* awarded to him. As to the second part respecting the costs: *Held*, that it was sufficiently certain, for it would become so upon taxation of costs by the proper officer; and that it would be final and otherwise according as there were or were not disputes about the sums already laid out. If there were any such disputes, or if the arbitrators did not take into consideration all the matters referred, that should have been pleaded. *Cargrey v. Aitchison*, T. 4 G. 4. 170
2. Debt on a bond conditioned for the performance of an award to be made within a limited time. The declaration, after setting out the condition, stated that before that time expired, the parties to the bond by deed agreed to give the arbitrators further time for making the award, and that an award was made within the extended time, and alleged non-performance: *Held* upon demurrer, that the action was maintainable upon the bond. *Greig v. Talbot*, T. 4 G. 4. 179
3. Upon the trial of an action on the case relating to the right of using a stream of water, a verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom all matters in difference were referred with liberty to the arbitrator to regulate future enjoyment of the stream. One of the parties to the cause having died before any award

was made, it was held that his death determined the arbitrator's authority, and an award made subsequently was set aside. *Rhodes v. Haigh and Another*, M. 4 G. 4. 345

4. A rule for setting aside an inquisition before the sheriff for excessive damages. The matter was referred, nothing being said about the costs of the application. The arbitrator by his award having reduced the damages, it was held, that the plaintiff was not entitled to the costs of the application. *Lewis v. Harris*, H. 4 & 5 G. 4. 620
5. A party after receiving the costs of a reference and award which, by the terms of a rule of reference, were to be paid by the other party, cannot move to set aside the award. *Kennard v. Harris*, E. 5 G. 4. 801

ARREST.

By the statute 43 G. 3, c. 46, s. 3, costs are to be allowed to a defendant arrested without probable cause: *Held*, that the statute does not extend to cases where the defendant pays money into court and the plaintiff takes it out, although it be a much smaller sum than that for which the defendant is holden to bail. *Davey v. Benton*, E. 5 G. 4. 711

ASSETS.

See ADMINISTRATOR, 1.

ASSIGNMENT.

See STAMP, 3.

ASSUMPSIT.

1. Where A, who held premises under a lease which expired at Midsummer, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till Christmas, and paid rent at Michaelmas and Christmas; *Held*, that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover a quarter's rent due at Lady-day. *Bishop v. Howard*, T. 4 G. 4. 100
2. In the parish of A. two church-wardens were elected for the township of B., and two others for the rest of the parish. Separate rates were made for these divisions: *Held*, that the churchwardens elected for the township of B. might maintain an action against their predecessors for money remaining in their hands, and were not bound to make all the present or late churchwardens of the parish plaintiffs or defendants. *Astle and Another v. Thomas and Another*, M. 4 G. 4. 271
3. Where a tenant occupied, under an agreement containing a variety of provisions, and amongst others, that he should keep the premises in tenantable repair: *Held*, that the landlord might declare generally "that the defendant became tenant, and in consideration thereof undertook to repair," without setting out the agreement. Where A. held premises under a lease containing a clause of re-entry for want of repairs, and afterwards underlet a part to B. who undertook to repair within three months after notice for that purpose; the premises underlet being out of repair, A.'s landlord threatened to insist upon the forfeiture if they were not repaired, and A. gave notice to B. to repair. The premises at the expiration of three months from that time remaining out of repair, A. entered and repaired: *Held*, that he might recover from B. the sum expended on that occasion. After the repairs were done by A., but before the commencement of the action, B. sold his interest in the premises to a person who pulled down and entirely rebuilt them: *Held*, that this did not deprive A. of his right to recover the whole sum expended by him. *Colley and Another v. Streeton and Others*, M. 4 G. 4. 273
4. Assumpsit by the endorsee against the maker of a promissory note, payable to A. B., or his order. Plea, first, non-assumpsit; and secondly, that A. B. became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to endorse the promissory note before the time of the endorsement became vested in the assignees, whereby the endorsement by A. B. was void, and created no right in the plaintiffs to sue. Replication to the last plea, that the endorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record. First, because the defendant who had made the note payable to A. B., or his order, was estopped from saying that A. B. was not competent to make an order. Secondly, because the property acquired by a bankrupt subsequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons. *Drayton and Another v. Dale*, M. 4 G. 4. 293
5. Declaration stated that by agreement between plaintiff and G. G., plaintiff agreed to sell and deliver to G. G. a lace machine for 220*l.*, to be paid thus: 40*l.* on delivery, and the residue by weekly payments of 1*l.*, which were to be paid to defendant, as trustee for the plaintiff, and in case of any default plaintiff was to have back the machine; and in consideration of the premises and of plaintiff, at the request of the defendant, appointing him to receive the weekly instalments, defendant promised the plaintiff to take the machine and pay the balance, should there be any default by G. G. in the weekly payments: *Held*, that this promise was nudum pactum and void. *Bates v. Cort*, M. 4 G. 4. 474
6. Declaration in assumpsit by the assignees of a bankrupt, stated that the defendant was indebted to the bankrupt before his bankruptcy in 1000*l.* for goods sold, &c., and concluded by stating that the plaintiff had sustained damage to that extent. Plea, that before the bankruptcy, upon an account stated between the bankrupt and the defendant, the latter was found to be indebted to the bankrupt in the sum of 400*l.*, for which said sum the bankrupt drew a bill upon the defendant, which the defendant accepted for and on account of the said several promises in the declaration mentioned, by reason whereof the defendant became liable to pay the bill. The plaintiff having replied over, it was held, upon demurrer to the replication, that the plea was bad, inasmuch as it was pleaded to the whole of the demand; and the giving of a bill

for 400*l.* was not, in point of law, a satisfaction of 1000*l.*, the amount of the debt claimed. *Thomas and Another, Assignees, v. Heathorn*, M. 4 G. 4. 477

7. A. and B. having been in partnership, dissolved it on the 14th of July, and the dissolution was advertised on the 17th. On the 16th a bill was drawn in the names of A. and B., which was accepted and paid by C. without consideration. C. afterwards sued A. and B. for money lent. A. pleaded bankruptcy and certificate. B. non-assumpsit. Noll. pros. as to A. *Held*, that he was a competent witness for B. to prove that C. accepted the bill for his (A.'s) accommodation and not for that of B. For that B. was only a surety, and might have proved under A.'s commission. *Moody v. King and Porter*, H. 4 & 5 G. 4. 558

8. In assumpsit on a promissory note, defendant pleaded non-assumpsit, and having made up the issue, ruled plaintiff to enter it, who by mistake entered a plea of not guilty. Defendant signed judgment of non-pros.: *Held*, that the plea entered was substantially the same as the other, and the judgment was set aside. *Aaron v. Chaundy*, H. 4 & 5 G. 4. 562

9. In assumpsit for not delivering goods upon a given day, the true measure of damages is the difference between the contract price and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered. *Gainsford v. Carroll and Others*, H. 4 & 5 G. 4. 624

10. Defendant's testator being sole owner of a ship, signed and delivered to the plaintiff G. J. K. an instrument describing the ship as copper bolted, (but not reciting the certificate of registry;) at the foot of which was written, "Sold the within-mentioned ship to G. J. K." He afterwards executed a bill of sale to the plaintiff in the usual form, which did not describe the ship as copper bolted. She was not copper bolted, and plaintiff declared in assumpsit against the defendants, (as executors of the vendor,) for the breach of his warranty in that particular. *Held*, that the action could not be maintained, the instrument first mentioned being void by the 34 G. 3, c. 68, s. 14. *Kain v. Old and Others, Executors*, H. 4 & 5 G. 4. 627

11. In assumpsit for money had and received, it was proved that Yarmouth has been a borough from time immemorial, and that until the time of Queen Anne, the chief officers of the corporation were two bailiffs; and various charters had confirmed to them all the fees before received by them. By statute 1 Ann. st. 2, c. 7, all fees payable to the bailiffs were to become payable to the mayor when the style of the corporation should be changed, which was done by charter in the following year. At a meeting duly holden before the defendant, then mayor, (he being by virtue of his office a justice of the peace,) and another justice for granting and renewing the licenses of publicans, the plaintiff applied to have his license renewed, and upon having it done, was required to pay amongst other fees the sum of 4*s.* to the mayor, which was proved to have been regularly paid for a period of sixty-five years: *Held*, first, that the defendant was not entitled to take any

such fee; for the payment for sixty-five years did not raise a presumption that it had been immemorially paid to the bailiffs or mayor of Yarmouth, inasmuch as licenses were not granted until the reign of Ed. 6, and the defendant, as justice of peace, was not entitled to any fee for granting the license. Secondly, that the defendant was not entitled under the 24 G. 2, c. 44, to notice of the action about to be brought against him, for that the fee could not have been taken by him as a justice, *colore officii*. Thirdly, that the payment was not voluntary, so as to preclude the plaintiff from recovering the money in this action. *Morgan v. Palmer*, E. 5 G. 4. 729

ATTORNEY.

1. The attorney to a commission of bankrupt applied to the attorney of a mortgagee of premises belonging to the bankrupt to join in the sale of the mortgaged premises. The mortgagee having consented, her attorney requested the bankrupt's attorney to prepare, on the part of the mortgagee, requisitions to the commissioners of bankrupt, to ascertain the amount of principal and interest due upon the mortgage, &c. The latter did so. The sale did not afterwards take effect. In an action brought by the bankrupt's attorney against the mortgagee's attorney for the amount due for the business done, it was held that the question was properly submitted to the jury, whether the credit was given to the defendant; and the jury having found that it was, that the attorney was liable, although at the time when the business was done, it was known to be done for the benefit of the mortgagee. *Scrace, Gent., one, &c., v. Whittington, Gent., one, &c.*, T. 4 G. 4. 11
2. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt subsequently to the issuing of the commission, to recover the amount of his bill. *Lambert v. Buckmaster*, H. 4 & 5 G. 4. 616
3. A communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in a cause. *Bramwell and Another, Assignees, v. Lucas and Others*, E. 5 G. 4. 745
4. A bill in equity was dismissed with costs. The plaintiff brought an action for the same cause, and recovered a verdict. The costs in equity may be set off against the judgment, subject to the lien of the attorney. *Harrison v. Bainbridge*, E. 5 G. 4. 800

AUCTIONEER.

See VENDOR AND VENDEE, 4.

AVERAGE.

A loss by general average is to be calculated between the owner of ship and the owner of goods, according to the law of the port of discharge. *Simonds and Loder v. White*, E. 5 G. 4. 805

AWARD.

See ARBITRAMENT. BOND, 3.

BANKRUPT.

1. In an action by the assignees of a bankrupt

- who had obtained his certificate, and released the surplus of his estate, the bankrupt is a competent witness to prove the hand-writing of the commissioners, in order to identify the proceedings taken under the commission against him. *Morgan, Assignee, v. Pryor*, T. 4 G. 4. 14
2. Assumpsit by the endorsee against the maker of a promissory note, payable to A. B., or his order. Plea, first, non-assumpsit; and secondly, that A. B. became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to endorse the promissory note before the time of the endorsement became vested in the assignees, whereby the endorsement by A. B. was void, and created no right in the plaintiffs to sue. Replication to the last plea, that the endorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record. First, because the defendant who had made the note payable to A. B., or his order, was estopped from saying that A. B. was not competent to make an order. Secondly, because the property acquired by a bankrupt subsequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons. *Drayton and Another v. Dale*, M. 4 G. 4. 293
3. Where A. and B. were partners, but the whole of the business was carried on by and in the name of A., B. never appearing to the world as a partner; and at the dissolution of the partnership, by effluxion of time, all the partnership stock and effects, by agreement between them, were left in A.'s hands, who was to receive and pay all the debts due to and from the concern, and to repay by instalments the capital brought in by B.; A. having continued to carry on the business as before for a year and a half, when he became bankrupt: *Held*, that all the partnership property and effects so left in A.'s hands, and also the debts due to the concern, passed to his assignees, being in the order and disposition of the bankrupt within the intent and meaning of the 21 Jac. 1, c. 19, s. 11. *Ex parte Enderby, in the Matter of Gilpin*, M. 4 G. 4. 389
6. An agreement between A., a merchant, and B., a broker, that the latter should purchase goods for the former, and in lieu of brokerage, should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses, does not vest in B. any share in the property so purchased, or in the proceeds of it, although it may render him liable as a partner to third persons. *Smith and Another, Assignees, v. Watson and Another*, M. 4 G. 4. 401
5. Where A. bought goods of a trader who had previously committed an act of bankruptcy, and paid for them bona fide without knowledge of the bankruptcy: *Held*, that the assignees, under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 Jac. 1, c. 15, s. 14. *Cash and Another, Assignees, v. Young*, M. 4 G. 4. 413
6. A customer was in the habit of endorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid; and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of bankruptcy. *Thomson and Others v. Giles and Others, Assignees*, M. 4 G. 4. 422
7. Declaration in assumpsit by the assignees of a bankrupt, stated that the defendant was indebted to the bankrupt before his bankruptcy in 1000*l.* for goods sold, &c., and concluded by stating that the plaintiff had sustained damage to that extent. Plea, that before the bankruptcy upon an account stated between the bankrupt and the defendant, the latter was found to be indebted to the bankrupt in the sum of 400*l.*, for which said sum the bankrupt drew a bill upon the defendant, which the defendant accepted for and on account of the said several promises in the declaration mentioned, by reason whereof the defendant became liable to pay the bill. The plaintiff having replied over, it was held upon demurrer to the replication, that the plea was bad, inasmuch as it was pleaded to the whole of the demand, and the giving of a bill for 400*l.* was not in point of law a satisfaction of 1000*l.*, the amount of the debt claimed. *Thomas and Another, Assignees, v. Heathorn*, M. 4 G. 4. 477
8. A. and B. having been in partnership, dissolved it on the 14th of July, the dissolution was advertised on the 17th, on the 16th a bill was drawn in the names of A. and B., which was accepted and paid by C. without consideration; C. afterwards sued A. and B. for money lent; A. pleaded bankruptcy and certificate, B. non-assumpsit, nol. pro. as to A.: *Held*, that he was a competent witness for B. to prove that C. accepted the bill for his (A.'s) accommodation, and not for that of B., for that B. was only a surety, and might have proved under A.'s commission. *Moody v. King and Porter*, H. 4 & 5 G. 4. 558
9. In an action for goods sold and delivered, brought by the assignees of A., against whom a commission of bankruptcy issued, on the petition of certain persons, who alleged that a debt was due to them as assignees of B. a bankrupt: *Held*, that the petitioning creditor's debt was sufficiently proved by the production of the proceedings under the commission, (no notice of an intention to dispute it having been given,) and that it was not incumbent on the plaintiffs to give

any other evidence, that the petitioning creditors were the assignees of *B. Skafte, Assignee, v. Howard*, H. 4 & 5 G. 4. 560

10. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against a bankrupt, subsequently to the issuing of the commission, to recover the amount of his bill. *Lambert v. Buckmaster*, H. 4 & 5 G. 4. 616

11. In an action by original, if the defendant does not appear, the bail-bond is forfeited on the quarto die post, the other four days being allowed merely *ex gratia*; and therefore where a commission of bankruptcy issued against one of the bail to the sheriff after the quarto die post, but within four days, it was held that the penalty of the bond was a debt provable under the commission, and therefore barred by the certificate. *Coulson, Assignee of the Sheriff of Middlesex, v. Hammon*, H. 4 & 5 G. 4. 626

12. The plaintiff, in an action of trespass having obtained a verdict, signed final judgment after the defendant had committed an act of bankruptcy, but before the issuing of a commission: *Held*, that the debt was provable under a commission subsequently issued, and that the defendant, who had been arrested on a ca. sa., was entitled to be discharged on obtaining his certificate. *Robinson v. Vale*, E. 5 G. 4. 762

BARON AND FEME.

By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds: *Held*, that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce *a mensa et toro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity. *See Clerk v. Thurlow*, H. 4 & 5 G. 4. 547

BILL OF EXCHANGE.

1. A bill was in fact drawn on the 21st day of December for 21l. payable two months after date; but on the face of it purported to bear date on the 31st: it was held to require only a stamp of 2s., which is imposed by 55 G. 3, c. 184, on bills for that sum, not exceeding two months after date. The word "date," as there used, meaning the period of payment expressed on the face of the bill. *Upstone and Another v. Marchant*, T. 4 G. 4. 10

2. A customer was in the habit of endorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him from the time

when made, and upon all payments by bills from the time when they were due and paid; and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson and Others v. Giles and Others, Assignees*, M. 4 G. 4. 423

3. In an action by the endorsee against the acceptor of a bill of exchange, whereof E. S. was the payee, the plaintiff proved that a person calling himself E. S. came to C., having in his possession the bill in question, and also a letter of introduction (proved to be genuine) which was expressed to be given to a person introduced to the writer as E. S., and also another bill of exchange, drawn by the writer of that letter. The bearer of these documents, after remaining ten days at C., during which time he daily visited the plaintiff, endorsed to him the bill in question, and received value for it, and also a letter of credit: *Held*, that this was evidence of the identity of this person with E. S., the payee of the bill, &c., in the absence of any evidence in answer, sufficient to justify a verdict for the plaintiff. *Bulkeley and Others v. Butler, in Error*, M. 4 G. 4. 434

4. Declaration upon a bill of exchange drawn by the plaintiffs upon one F. W., endorsed by the plaintiffs to defendant, and re-endorsed by him to the plaintiffs. Averment, that at the time of the drawing of the said bill, and of the endorsement by the defendant to the plaintiffs, it had been agreed between them that the name of the defendant should be endorsed upon the bill as a security to the plaintiffs for the due payment thereof by F. W., and that the bill was so endorsed by the defendant under such agreement, and for such purpose only, and that the plaintiffs took and received the bill in satisfaction of such debt of the said F. W., upon the faith that the defendant would endorse the same as such security, and that the endorsement by plaintiffs was made without any consideration, and for the purpose only of procuring the endorsement of the defendant, and making the bill negotiable. Averment, that the bill was presented to F. W., and that he refused to pay, and that notice of such refusal was given to the defendant, and he thereby became liable to pay, and being liable, promised: *Held*, upon demurrer, that this declaration was bad, inasmuch as, if the action was founded upon the bill, the plaintiff could only recover according to the custom of merchants, and by that custom the plaintiffs, as endorsers and drawers, would be liable to pay the amount of the bill to the defendant; and if the action was considered as founded upon the special contract, it was not maintainable, inasmuch as there was not any consideration for the defendant's endorsement. *Britten and Another v. Webb*, M. 4 G. 4. 463

BOND.

1. A bond was given by country bankers to the several persons constituting the firm of a London banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the London bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the London bankers. It was the course of business between the two houses for the London bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the London bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the London bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time: *Held*, that the entries in the books of the London bankers did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it; and therefore that the London bankers, notwithstanding those entries, were entitled to apply the payments received subsequently to the death of the deceased partner to the debt of the new firm. *Simson and Others v. Ingham and Others*, T. 4 G. 4. 65

2. A subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution, it was agreed that it should remain in his (the subscribing witness's) hands until the death of A. B., and until certain securities were given up, and that the bond was given up to him upon that condition: *Held*, that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B., and until the notes were delivered up.

Semble, That it is not essential in order that an instrument should operate as an escrow only, that it should be expressly declared at the time when it is executed, that it was not to operate as a deed until a given event happened.

It is not necessary in a declaration upon a post obit bond, to aver the death of the person upon whose death the money secured by the bond was to become payable.

A post obit bond (upon which a forfeiture has taken place) is not within the statute of

the 8 & 9 W. 3, c. 11; and therefore it is unnecessary to suggest breaches.

Semble, That such a bond is within the 4 & 5 Anne, c. 15. *Murray, Administrator, v. The Earl of Stair*, T. 4 G. 4. 82.

3. Debt on a bond conditioned for the performance of an award, to be made within a limited time. The declaration, after setting out the condition, stated that before that time expired, the parties to the bond by deed agreed to give the arbitrators further time for making the award, and that an award was made within the extended time; and alleged non-performance: *Held*, upon demurrer, that the action was maintained upon the bond. *Greig v. Talbot*, T. 4 G. 4. 179

4. Debt on bond conditioned for the payment of money by instalments. Plea, that defendant by W., as his agent, made unlawful contracts for buying and selling shares in the public stocks; that these contracts were not specifically performed, but that W., as the agent of the defendant, voluntarily paid 500*l.* for differences against the form of the statute, and that for securing the repayment of that money to W., the defendant gave his promissory note to W., and that long after the same became due, W. endorsed it to the plaintiffs, and that the plaintiffs afterwards threatened to commence an action upon the note against the defendant; and the defendant, in fear of the action, did, at the request of the plaintiffs, give the bond in question, which the plaintiffs accepted in lieu of the promissory note, and the money secured thereby, they well knowing that the note had been made by the defendant on the occasion, and for the purpose in the plea mentioned: *Held*, that this plea was an answer to the action, inasmuch as the plaintiffs took the promissory note after it was due, and had notice of the illegality of the original consideration before the bond was given.

At the trial, it appeared in evidence, that the note was given to W. to cover a sum which he, as broker, was to pay for losses on stock-jobbing transactions: *Held*, that this evidence did not support the plea, which stated that the note was given to secure the re-payment of money actually paid by W. *Amory and Another v. Meryweather*, H. 4 & 5 G. 4. 573

5. In an action by original, if the defendant does not appear, the bail-bond is forfeited on the quarto die post, the other four days being allowed merely ex gratia; and, therefore, where a commission of bankruptcy issued against one of the bail to the sheriff after the quarto die post, but within four days, it was held that the penalty of the bond was a debt provable under the commission, and therefore barred by the certificate. *Coulson, Assignee of the Sheriff of Middlesex, v. Hanson*, H. 4 & 5 G. 4. 626

BRIDGE.

See INDICTMENT, 1.

BROKER.

See PARTNERSHIP, 2.

CHARTER-PARTY.

Where the charterers of a ship for a voyage from C. to St. B., and thence to G. to take in a homeward cargo, caused another ship to

be chartered on their account to go out in ballast and bring home a cargo from G., with a proviso, that in the event of the non-arrival of the first mentioned ship at G., then the second charter should be void: *Held*, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not being attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. *Soames and Another v. Loneragan and Another*, H. 4 & 5 G. 4. 564

CHURCHWARDENS.

1. In the parish of A., two churchwardens were elected for the township of B., and two others for the rest of the parish. Separate rates were made for these divisions: *Held*, that the churchwardens elected for the township of B. might maintain an action against their predecessors for money remaining in their hands, and were not bound to make all the present or late churchwardens of the parish plaintiffs or defendants. *Astle and Another v. Thomas and Another*, M. 4 G. 4. 271

2. A parish certificate, purported to be granted in 1761 by A., the only churchwarden, and B., the only overseer of the parish: *Held*, that it must now be taken to have been a good certificate, because it may be intended in favour of such an instrument, that by custom there was only one churchwarden in the parish, and that two overseers had been originally appointed, but that one of them died, and that the certificate was granted before the vacancy in the office was filled up. *The King v. The Inhabitants of Catesby*, E. 5 G. 4. 814

CLERK OF THE PEACE.

See EVIDENCE, 10.

COMMISSIONER OF INCLOSURE ACT.

See INCLOSURE ACT, 1.

COMPURGATORS.

See PRACTICE, 10.

CONSTABLE.

See TRESPASS, 2.

CONVICTION.

1. Where a conviction stated that "C. H. was convicted of having been found on board a vessel subject to forfeiture, for hovering within the limits of a port of this kingdom, having certain contraband goods on board:" *Held*, that this was bad. First, for that it should have been stated that the vessel was hovering without lawful excuse. Secondly, for that C. H. should have been described as a British subject. *Ex parte Hawkins*, T. 4 G. 4. 31

2. Since the passing of the 50 G. 3, c. 41, the manufacturer of goods is allowed to hawk them in those places only which are mentioned in the twenty-third section of that act.

The defendant was convicted in a penalty of 10*l.* for trading as a hawker, without any license so to do: *Held*, that the conviction

was in the proper sum. *The King v. Webb-ell*, T. 4 G. 4. 136

3. A person exposing to sale and selling tea as a hawker, without a license, is liable to the penalty imposed by the 50 G. 3, c. 41, upon hawkers trading without a license, although even with a license he would be liable to a penalty for selling tea in an unentered place.

The defendant was convicted in a penalty of 10*l.*: *Held*, that it was the proper sum. *The King v. M'Gill*, T. 4 G. 4. 142

4. In a conviction under the 3 G. 4, c. 110, it is necessary that the offence should appear to have been proved on the oath of one or more credible witnesses, and therefore, where the conviction stated, "that R. A. was convicted of carrying brandy liable to seizure," (without saying upon oath, and proceeded, "and it is this day, in like manner, also proved, on the oath of J. H., that the brandy was taken from R. A., and that he was detained by an officer of the navy, &c.:" *Held*, that carrying the brandy was the offence, and as that was not stated to have been proved on oath, the conviction was bad, and that R. A. (having been committed to prison) was entitled to be discharged. *Ex parte Aldridge*, H. 4 & 5 G. 4. 600

5. In an information on the 5 Ann. c. 14, s. 2, against a carrier between Norwich and London, for having game in his possession as carrier, it is not necessary to aver that the defendant is not a person qualified to kill game, nor that he had the game in his possession knowingly. The evidence for the prosecution was, that game was found in the defendant's wagon at an intermediate place between Norwich and London: *Held*, that there was sufficient *prima facie* evidence that the defendant had it in his possession as carrier. The evidence for the defendant was, that his book-keeper living at that place did not know of any game having been put in there. Neither the driver of the wagon nor his assistant was called as a witness: *Held*, that this evidence did not vary the case, and that the defendant was properly convicted of having the game in his possession as carrier. *The King v. Marsh*, E. 5 G. 4. 717

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An Author publishes his work in a foreign country in 1814, and afterwards agrees to sell to A. the exclusive right of printing the same work in this country, but no agreement or consent in writing was then entered into. A. publishes the work in September, 1814, in England. In 1818, B. publishes the same in England. In 1822, the author, by an agreement in writing, assigns to A. the exclusive right of printing the work in England: *Held*, that A. did not, by the parol consent given by the author in 1814, acquire the exclusive right of publishing the work in England: secondly, that that could not be deemed a publication by the author, not being made on his account, or for his benefit: *Held*, thirdly, that the publication by B. in 1818 was a lawful publication; and, fourthly, that the author could not afterwards, in 1822, by making a valid assignment to A., enable him to maintain an action against B. for selling a copy of the same work after

such assignment was executed. *Clementi and Others v. Walker*, E. 5 G. 4. 861

CORPORATION.

1. The annual indemnity act is prospective as well as retrospective, and extends to those who may be in default during the time for which it is made, and is not limited to those who had incurred penalties or disabilities before it passed. *In the Matter of Stevenson and Others*, T. 4 G. 4. 34
2. By charter, a borough was constituted a body corporate, to have perpetual succession by the name of the mayor and free burgesses of the borough of F. Nine of the free burgesses were to be chosen aldermen. One of the aldermen was to be called mayor. The mayor and aldermen were to form the common council; a person learned in the laws of England was to be recorder. The charter then authorized the mayor and recorder, or their respective deputies, and the rest of the aldermen of the borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time, and at all times thereafter, as often, and when to them should seem fit and necessary, to nominate, choose, and prefer so many, and such persons to be free burgesses of the borough, as they pleased, and to those free burgesses so to be chosen, to administer an oath for their fidelity to the borough. Nine persons were nominated as the first aldermen, one person as recorder, and five persons the first free burgesses; and in case any one or more of the aldermen should die, or be removed from his office, the mayor, recorder, justices of peace, and the rest of the aldermen, or the greater part of them, to elect one other of the free burgesses, inhabitants of the borough, for an alderman, to supply the number of nine. The alderman so chosen taking the oaths before the mayor, recorder, or one of the justices of the peace of the borough for the time being, or before two or more aldermen, or for want of mayor, recorder, justices, and aldermen, before three or more free burgesses, inhabitants of the borough, to execute the office, and the mayor, the ex-mayor, the recorder, and their deputies, and the senior alderman, and the senior free burgess were to be justices of the peace. It appeared by affidavits, that the body corporate had for three years been reduced to the number of six aldermen and four free burgesses, and that one of the aldermen was in a dangerous state of health, and was upwards of seventy years of age, and incapable of performing the duties of alderman and justice of the peace; that of the four burgesses, two were upwards of seventy years of age, and that another was not an inhabitant of the borough. The Court refused to grant a mandamus to compel the mayor and aldermen to proceed to the election of free burgesses, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election. *The King v. The Mayor, Recorder, and Aldermen of the Borough of Fowey*, H. 4 & 5 G. 4. 584
3. Where the charter of a corporation provided that there should be a high steward and an under steward, and imposed upon the latter various judicial and ministerial duties, and did not give him power to appoint a

deputy: *Held*, that he could not appoint a deputy generally to discharge all the ministerial duties of his office; although a by-law of the corporation required that "he or his sufficient deputy" should attend at every court, to execute the duties of the office.

Quære, Whether he could have made such an appointment for the discharge of any particular ministerial duty? *The King v. Mayor, &c., of Gravesend*, H. 4 & 5 G. 4. 602

4. The bailiff and burgesses of Ilchester, (a corporation by prescription,) had from time immemorial been lords of the manor of Ilchester, and as such had, during all that time, holden a court-leet for the manor, on certain days, in the guildhall of the borough, which was their property. In the 2d Ph. & M. they accepted a charter, which purported to grant to them a court-leet to be holden in the guildhall, as of ancient time had been used. By an award afterwards made in pursuance of a private act of parliament, "the manor of Ilchester, with the rights, members, courts, view of frank-pledge, &c., royalties, and appurtenances, (excepting to the bailiff and burgesses, the guildhall, houses, buildings, court, or garden, belonging to the same, &c.," were conveyed to Lord H.: *Held*, that although the exception retained in the bailiff and burgesses the property in the guildhall, yet the lord of the manor had a right to hold the court-leet there. *The King v. The Bailiff and Burgesses of Ilchester*, E. 5 G. 4. 764

COSTS.

See ARBITRAMENT, 1, 5. PLEADING, 11.

1. Where the plaintiff was discharged under the insolvent act, after issue joined, and before notice of trial given, the court stayed the proceedings until the assignee, or some creditor of the plaintiff, should give security for costs. *Heaford v. Knight*, H. 4 & 5 G. 4. 579
2. A certificate that a trespass was wilful to entitle plaintiff to his full costs under the 8 & 9 W. 3, c. 11, s. 4, need not be granted immediately after the trial of the cause. *Woolley v. Whitty*, H. 4 & 5 G. 4. 580
3. Where the defendants, in an indictment for misdemeanor, submitted to a verdict of guilty, upon an understanding that they were not to be brought up for judgment: *Held*, that the prosecutor was not entitled to costs, no agreement having been expressly made respecting them. *The King v. Rawson and Others*, H. 4 & 5 G. 4. 599
4. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt subsequently to the issuing of the commission, to recover the amount of his bill. *Lambert v. Buckmaster*, H. 4 & 5 G. 4. 616
5. A rule for setting aside an inquisition before the sheriff for excessive damages. The matter was referred, nothing being said about the costs of the application. The arbitrator by his award having reduced the damages, it was held, that the plaintiff was not entitled to the costs of the application. *Lewis v. Harris*, H. 4 & 5 G. 4. 630
6. A judge's certificate, under stat. 22 & 23 Car. 2, c. 9, may be granted within a res-

- conable time after the trial. *Johnson v. Stanton*, H. 4 & 5 G. 4. 621
7. Semble, that the Court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud and perjury. *Doe dem. Rees v. Thomas*, H. 4 & 5 G. 4. 622
- By the statute 43 G. 3, c. 46, s. 3, costs are to be allowed to a defendant arrested without probable cause: *Held*, that the statute does not extend to cases where the defendant pays money into court, and the plaintiff takes it out, although it be a much smaller sum than that for which the defendant is hoken to bail. *Davey v. Renton*, E. 5 G. 4. 711
9. A bill in equity was dismissed with costs. The plaintiff brought an action for the same cause, and recovered a verdict. The costs in equity may be set off against the judgment, subject to the lien of the attorney. *Harrison v. Bainbridge*, E. 5 G. 4. 800

COUNTY RATE.

See RATE, 3.

COURT LEET.

See CORPORATION, 4. CUSTOM, 1.

COVENANT.

- 1 Plaintiff demised by indenture to B. (defendant's testator) certain premises, to hold for eleven years, from the 29th September, 1809. B. covenanted, amongst other things, that he would not, during the lease, sell or convey away from the premises any of the straw which, during the leased term, should grow upon the premises, (except wheat-straw and rye-straw,) and that for every load of hay, wheat-straw, and rye-straw, which should be sold or removed off from the premises during the thereby leased term, he (B.) would bring back a cart-load of dung; and plaintiff covenanted, that it should be lawful for B. to have the use of the barns, &c., for receiving his crops of corn and hay which should grow upon the premises in the last year before the end of the term thereby granted, and for certain other purposes, until the 1st day of May next after the expiration of the said term, without paying any rent for the same. The fourth breach assigned was that B., during the said leased term, to wit: on September 30th, 1820, and on divers other days between that day and May 1st, 1821, did remove off from the premises large quantities of hay, wheat-straw, and rye-straw, without bringing back a cart-load of dung for each load of hay and straw. Plea to so much of that breach as relates to removing hay, &c., during the said leased term, that B. did bring back a load of dung for each load of hay, &c., removed; and demurrer to the residue of that breach. Joinder in demurrer. Defendants also pleaded to all the breaches except the fourth, and to so much of that as related to removing hay, &c., during the said leased term, a release of all causes of action, except such as plaintiff had in respect of B.'s not bringing back to the premises manure for the hay, &c., removed after the 29th September, 1820. Demurrer and Joinder: *Held*, that the plea to the fourth breach answered the whole of that breach, and that therefore the

- demurrer to the residue was bad: *Held* also that the leased term continued for certain purposes until the 1st of May, 1821; so that the release did not extend to all acts of removal done during the leased term; and therefore the plea of release did not answer so much of the fourth breach as it affected to answer, and being bad in part was bad in toto. *Earl of St. Germain's v. Willan and Another, Executors*, T. 4 G. 4. 216
2. In covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A. *Higgins v. Sargent and Others*, M. 4 G. 4. 348
3. By a deed of three parts between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds. *Held*, that this deed was legal and binding, and that a plea by the husband that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits charging her with adultery, and that a decree of divorce à mensa et toro was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity. *See, Clerk, v. Thurlow*, H. 4 & 5 G. 4. 547
4. Lessee, who has erected fixtures for the purpose of trade upon the demised premises, and afterwards takes a new lease to commence at the expiration of his former one, which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist to show that they were not intended to pass under the general words of the second demise.
- Quære, whether any circumstances dehors the deed can be alleged to show that they were not intended to pass?
- Quære, whether lime-kilns erected for the purpose of trade are removable? *Thresher v. The East London Waterworks*, H. 4 & 5 G. 4. 608
5. A. and B. (being owners of nine-sixteenth shares of a ship, and also husbands or managing owners,) by deed sold five-sixteenths to C. The deed contained a covenant that C. should be appointed to the command of the ship, and that A. and B. should continue to have the management, as husbands, and should elect the tradesmen and appoint all the officers; and that if C. should relinquish the command, or die, A. and B. should appoint such fit person to succeed him as might be approved of by him or his executors, or that he or they might nominate a fit person to the command in his stead, and that A. and B. should be employed as the agent of C. in the concerns of the ship; and that if C. should be minded to sell all or any of his shares he might do so, upon condition that the purchasers should abide by the stipulations in the deed, and not remove A. and B., or the survivor of them, from being managing owners, so long as they should perform the

stipulations on their part: *Held*, that although the covenant to continue A. and B., as C.'s agents in the concerns of the ship, might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares, with a stipulation for the appointment to the command, and the continuance of the management, it was illegal and void. *Card and Cannan v. Hope*, H. 4 & 5 G. 4. 661

CUSTOM. See POOR RATE, 1.

1. A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom. A custom for the steward of a court-leet to nominate certain persons to the bailiff, to be summoned on the jury, is a good custom. *Rea v. Joliffe*, T. 4 G. 4. 54
2. A custom which binds the tenants and re-siants within a manor to grind at the lord's mill "all their corn and grain which they use ground in their dwellings," does not prevent them from buying and using in their dwellings flour produced from corn ground at other mills. *Richardson and Another v. Walker*, E. 5 G. 4. 827
3. Where the lord of a manor had two mills, and the tenants and re-siants were, by custom, bound to grind all their malt which they used in their dwellings, at the said mills, but might take it to either at their own option: *Held*, that the lord, having pulled down one of the mills, had thereby suspended the custom. *Richardson and Another v. Copes*, E. 5 G. 4. 841

DAMAGES. See VENDOR AND VENDEE, 6.

DEBT ON BOND. See BOND, 3.

DEED. See COVENANT, 3, 5. STAMP, 3.

1. A being seised in fee of the manor of F. and the demesne lands thereof, and of all the coal mines lying under the manor, enfeoffed C. D. of and in certain closes, except and always reserved to the feoffor, his heirs, and assigns, all tithes of corn and grain, and also except and always reserved out of the said feoffment unto the feoffor and his heirs, all the coals in all or any of the said lands and premises, together with free liberty for them, the said feoffor and his heirs, and his and their assigns and servants, at all times thereafter, during the time that he, the feoffor, and his heirs, should continue owners and proprietors of the demesne lands of F., to sink and dig pits, or otherwise to sough and get coals in all and every the lands and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their free will and pleasure, he, the said feoffor, and his heirs, paying to the feoffee, his heirs and assigns, such satisfaction for the damages as two neighbours, indifferently chosen by the feoffee and feoffor, their heirs and assigns, should from time to time award.

The heirs of the feoffor having, for a valuable consideration, conveyed to a purchaser

in fee the manor of F. and its demesne lands, with its appurtenances, and all the coal mines under (amongst others) the lands in question, &c., it was held that the coals were, by the exception, reserved to the feoffor in fee, and therefore they passed to the purchaser: *Held*, also, that the latter was entitled, under the express liberty reserved, to enter upon the land, to dig pits, and get the coals, so long as he remained owner of the demesne lands.

Semble, That the express liberty is not restrictive of that which would be implied by law to get the coals, and that the purchaser would be entitled to an incidental right to get them co-extensive with his estate. *The Earl of Cardigan v. Armitage*, T. 4 G. 4. 197

DEED OF SEPARATION. See COVENANT, 3.

DEMAND. See DISTRESS, 1. FIXTURES, 1.

DEVISE.

1. A., by will duly executed to pass real estates, devised and bequeathed to trustees, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every his freehold, copyhold, and leasehold estates, and all his personal estate and effects whatsoever and wheresoever, in trust to pay thereout the several legacies and annuities therein by him given and bequeathed, and for other purposes in the will mentioned. The testator then gave legacies and annuities to a considerable amount: and directed that the annuities should be chargeable upon his 26,400*l.* in the 3 per cent. consolidated annuities. It was stated in the case that a large surplus remained after paying debts, legacies, and annuities; but it was not stated that the legacies were actually paid, or that the annuitants were dead. After the legacies and annuities, the testator proceeded, "All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seised or possessed of, interested in, or entitled to, at the time of my decease, I do give, devise, and bequeath unto my three nieces. E. M., M. M., and C. M., equally to be divided between them *share and share alike, for and during the term of their natural lives*. And from and after the decease of them or either of them, it is my will that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue of such rents, issues, dividends, and profits *for life in like manner*. And if either of my nieces shall happen to die in the lifetime of the others or other of them without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid shall go to and be shared and divided equally between the survivors of my nieces for their respective lives, and afterwards by the lawful issue of the survivors of my nieces in like manner. And if all my nieces and their issue, save one, shall die without issue law-

fully begotten, then such surviving niece shall have and enjoy the whole of the rents, &c., of such residue of my estate and effects for and during the term of her natural life. And from and after her decease, the lawful issue of such surviving niece (if more than one) shall have the whole of the rents, &c., equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part thereof as is personal, to and for his or her own use and benefit; and to hold so much and such part or parts thereof as are freehold, to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint-tenants; and if but one, then to such one, his or her heirs and assigns for ever. And if all my nieces shall die without issue, then from and after the decease of the survivor of them my nieces without issue as aforesaid, I give the whole of such residue to my next male heir of the name of Murthwaite, to hold to him, his heirs, executors, and administrators, in manner aforesaid." Two of the trustees were dead. All the nieces were still living; two of them had no children, the other had one child, a son, G. B.

Held, first, that J. C., the surviving trustee, now has a fee-simple in the freehold estates, and an absolute interest in the leasehold.

Secondly, that the testator's three nieces took no legal estate under the will.

Thirdly, that G. B. took no estate under the will.

Fourthly, supposing that the will had commenced with the words "all the rents," &c., and the passage before those words had been omitted, the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold.

Fifthly, that G. B. would have no estate in the freehold or leasehold tenements; but should he survive the three nieces, and neither of them should have any other child, he would be tenant in tail of the freehold, but have no interest in the leasehold estates. Should he die in the lifetime of the three nieces, he would die seized of no freehold, nor possessed of any leasehold estate. *Murthwaite and Others v. Jenkinson and Others*, M. 4 G. 4. 357

2. A. being seized in fee of an estate called H., subject to a mortgage for years, by his will (in which there was a statement in figures of the amount of the estimated value of his entire property, of the sum which his wife had brought him on his marriage, and of the sum which he himself had settled upon his marriage, and of the estimated value of the estate at H.) directed that his daughter C. M. should have the disposal of the sum which he himself had settled on his wife, and in case she did not dispose of it, that it was to go to certain persons therein named. He then desired that H. should go to his daughter C. M. as follows: in case she married and had a son, to go to that son; in case she had more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she had but one daughter or no child at that time, he desired it might go to his brother W. M. He then gave specific legacies nearly to the amount of the sum which remained, after

deducting the money settled on his marriage and the value of the estate at H. And he directed that his daughter should pay an annuity to a person therein named for life: and then he made his brother W. M. his sole legatee: *Held*, that C. M. took an estate in tail-male in H., with a reversion in fee, subject to the other estates created by the will. *Mellish v. Mellish*, M. 4 G. 4. 520

3. Devise "to my daughter M. G. all the houses, out-houses, garden, and other property, which I now hold under the trustees of the poor of the township of A. for the term of 999 years. I also give one half part of my books to my daughter M. G. aforesaid; the other half part to my widow S. G., to be equally divided by T. S. If my daughter M. G. should happen to die unmarried, it is my will then that her part aforesaid shall be equally divided amongst all my brothers and sisters, share and share alike by lot:" *Held*, that the latter clause applied to all that had before been given to M. G., and not merely to her half part of the testator's books. *Doe dem. Gibson and Others v. Gell*, E. 5 G. 4. 680

4. Devise "to testator's son G. for life, and from and after his decease unto all and every the child and children of G. lawfully to be begotten and their heirs for ever, to hold as tenants in common and not as joint-tenants: but if my son G. should die without issue, or leaving issue, and such child or children should die before attaining the age of 21 years or without lawful issue, then I give and devise the same estates unto my son T., my daughter A. S., and my son-in-law W. D., and to their heirs for ever as tenants in common and not as joint-tenants." After testator's death, G. suffered a recovery, and died unmarried and without issue: *Held*, that in that event the devise over must take effect if at all as a contingent remainder, and was therefore defeated by the destruction of the particular estate by the recovery. *Doe dem. Herbert and Others v. Selby*, E. 5 G. 4. 926

DISTRESS.

1. The plaintiff's goods were distrained for poor rates, and upon the sale produced 4l. 7s. more than was necessary to satisfy the levy. The defendants tendered to him 3l. 14s. which he refused to accept, saying that it was too late, but did not then, or at any other time, demand a settlement of the account and the payment of the overplus: *Held*, that the 27 G. 2, c. 20, prevented the plaintiff from recovering without making a demand before the commencement of the action, and that the tender did not make such demand unnecessary. *Simpson v. Routh and Others*, E. 5 G. 4. 682

2. Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized. *Willoughby v. Backhouse and Marshall*, E. 5 G. 4. 821

DOWER.

A widow before assignment of dower has not such an interest in the land of which she is dowable as to be irremovable from the parish in which the land lies. *Rea v. Inhabitants of North Weald Bassett*, E. 5 G. 4. 724

DYING DECLARATIONS.

See EVIDENCE, 15.

EJECTMENT.

1. Where a lease contained a proviso that if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made:" *Held*, that the rent having been in arrear for the time specified, an ejectment might be maintained without actual re-entry, and without any demand of the rent. After trial the court will not relieve the tenant by staying proceedings in the ejectment upon payment of the arrears of rent and costs. *Doe dem. Harris v. Masters*, M. 4 G. 4. 490
2. Semble, that the court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud and perjury. *Doe dem. Rees v. Thomas*, H. 4 & 5 G. 4. 622

ELEGIT.

See PRACTICE, 4.

ENCLOSURE ACT.

By the eighth section of the general enclosure act, (41 G. 3, c. 109,) when complaints are made against public roads set out by a commissioner, he and a justice are to hear them, and *finally direct* what is to be done; and by the tenth section, private roads are to be set out, subject to the same provisions as are contained in the eighth section respecting public roads. A private enclosure act, in which the general enclosure act was recited, gave an appeal in all cases, (except as to such acts, determinations, and proceedings of the said commissioner as were by the said recited act, or that act, directed to be final, binding, and conclusive.) The commissioner under that act having set out a private road, which was objected to, he and a justice upon hearing the complaint, ordered that the road should be disallowed: *Held*, that the appeal against such order was not taken away, because it was not an order of the commissioner alone, but of him and a justice of peace together; and because the tenth section of the general act does not expressly say that the order of the commissioner shall be final respecting private roads. *The King v. The Justices of the West Riding of Yorkshire*, T. 4 G. 4. 228

ESCROW.

- A subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution, it was agreed that it should remain in his (the subscribing witness's) hands until the death of A. B., and until certain securities were given up, and that the bond was given up to him upon that condition: *Held*, that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B., and until the notes were delivered up.

Semble, That it is not essential in order that an instrument should operate as an escrow only, that it should be expressly de-

clared at the time when it is executed, that it was not to operate as a deed until a given event happened. *Murray, Administrator, v. The Earl of Stair*, T. 4 G. 4. 62

EVIDENCE.

1. Where a declaration against a sheriff for taking insufficient pledges in a replevin bond stated that the party replevying levied his plaint "at the next county court, to wit, at the county court holden on, &c., before A., B., C., and D., suitors of the court," which plaint was afterwards removed by re. fa. lo.; and by that record it appeared that the plaint was levied at a court holden before E., F., G., H.: *Held*, that the variance was immaterial, for that it was unnecessary to state or prove the names of the suitors, and that they might be rejected as surplusage. *Draper v. Garratt and Another*, T. 4 G. 4. 2
2. In an action by the assignees of a bankrupt who has obtained his certificate, and released the surplus of his estate, the bankrupt is a competent witness to prove the hand-writing of the commissioners, in order to identify the proceedings taken upon the commission against him. *Morgan v. Pryor*, T. 4 G. 4. 14
3. Declaration, that for certain hire and reward defendants undertook to carry goods from London and deliver them safely at Dover. The contract proved was, to carry and deliver safely (fire and robbery excepted): *Held*, that this was a variance. *Latham v. Rutley*, T. 4 G. 4. 20
4. A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom. *The King v. Joliffe*, T. 4 G. 4. 54
5. A subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution it was agreed that it should remain in his (the subscribing witness's) hands until the death of A. B., and until certain securities were given up, and that the bond was given up to him upon that condition: *Held*, that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B., and until the notes were delivered up. *Murray, Administrator, v. The Earl of Stair*, T. 4 G. 4. 62
6. Where A., who held premises under a lease which expired at Midsummer, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till Christmas, and paid rent at Michaelmas and Christmas: *Held*, that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover a quarter's rent due at Lady-day. *Bishop v. Howard*, T. 4 G. 4. 100
7. A libel imputed that his majesty laboured under mental insanity; and it stated that the writer communicated the fact from authority. Upon the trial of the information, the publication of the libel was proved. It was admitted by the defendants that the statement in the libel was untrue, and they did not offer any evidence to show that they

and any authority for making it; and the Judge in his charge to the jury having stated that it was a criminal act to assert falsely of his majesty, or of any other person, that he was insane, and it being admitted by the defendants themselves that the fact stated in the publication was false, in his opinion it was a libel: *Held*, that this direction was correct in point of law, and that the Judge was warranted in saying that the defendants had admitted the charge contained in the libel to be false; for assuming that there might be a distinction between a mere untruth and a criminal untruth, and that the term "false" applied only to the latter, still as the defendants had stated that they communicated the fact from authority, and had not proved that they had any such authority, they must have been guilty of a criminal untruth or falsehood by stating as a fact the knowledge of which they had derived from authority, that which was untrue, and for which they had no authority.

The jury having retired for a considerable time, returned into court, and desired to know whether it was necessary that there should be a malicious intention in order to constitute a libel; to which the Judge answered, "The man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary:" *Held*, that this answer was correct in point of law, and that the Judge was not bound to answer in the affirmative or negative the abstract question put to him; and assuming that a malicious intention is necessary to constitute a libel, that intention is to be inferred from the mischievous tendency of the publication itself, unless the defendant shows something to rebut such inference, and therefore that the publication of a libel of mischievous tendency having been proved, and the defendant not having shown that he published it from authority, the jury were bound to find that he published it with a malicious intention. *The King v. Harvey and Chapman*, M. 4 G. 4. 257

8. In an action by the endorsee against an acceptor of a bill of exchange, whereof E. S. was the payee, the plaintiff proved that a person calling himself E. S. came to C., having in his possession the bill in question, and also a letter of introduction (proved to be genuine) which was expressed to be given to a person introduced to the writer as E. S., and also another bill of exchange, drawn by the writer of that letter. The bearer of these documents, after remaining ten days at C., during which time he daily visited the plaintiff, endorsed to him the bill in question, and received value for it, and also a letter of credit: *Held*, that this was evidence of the identity of this person with E. S., the payee of the bill, &c., in the absence of any evidence in answer, sufficient to justify a verdict for the plaintiff. *Bulkeley and Others v. Butler*, in *Error*, M. 4 G. 4. 434

9. Where in case for slander of title it appeared by the declaration that the plaintiff had a certain interest in the premises, and that by an agreement between himself and the defendant, (from whom he derived that interest,)

he had a clear right to dispose of the whole of that interest, but only a doubtful right to dispose of any portion of it, and the plaintiff averred that he put up his said interest to auction, and that defendant published a libel of and concerning his right to sell the said interest; the evidence being that he offered for sale a portion of that interest only: *Held*, that this was a fatal variance. *Millman v. Pratt*, M. 4 G. 4. 486

10. In an action for maliciously, and without probable cause, charging plaintiff with an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced into writing, and that he delivered them at the court of quarter sessions to the clerk of the peace or his deputy. The clerk of the peace stated that a bill of indictment for the assault was preferred, and that the grand jury returned ignoramus, that it was usual in such case to throw away or destroy the depositions; that he had searched among his papers, and could not find them: *Held*, that parol evidence of the contents was admissible; and that it was not necessary to call the deputy-clerk of the peace to show that the original depositions were not in his possession, inasmuch as it was his duty, if he had received them, to have delivered them to his principal, and not being in his custody, it was to be presumed that they were lost or destroyed. *Freeman v. Arkell*, M. 4 G. 4. 494

11. By the conditions of a sale by auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid: *Held*, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other. *Phillips v. Bistolli*, M. 4 G. 4. 511

12. A. and B. having been in partnership, dissolved it on the 14th of July, the dissolution was advertised on the 17th, on the 16th a bill was drawn in the names of A. and B., which was accepted and paid by C. without consideration; C. afterwards sued A. and B. for money lent; A. pleaded bankruptcy and certificate, B. non-assumpsit, nol. pros. as to A.: *Held*, that he was a competent witness for B. to prove that C. accepted the bill for his (A.'s) accommodation, and not for that of B., for that B. was only a surety, and might have proved under A.'s commission. *Moody v. King and Porter*, H. 4 & 5 G. 4. 553

13. In an action for goods sold and delivered, brought by the assignees of A., against whom a commission of bankruptcy issued, on the petition of certain persons, who alleged that a debt was due to them as assignees of B. a bankrupt: *Held*, that the petitioning creditor's debt was sufficiently proved by the production of the proceedings under the commission, (no notice of an intention to dispute it having been given,) and that it

- was not incumbent on the plaintiffs to give any other evidence, that the petitioning creditors were the assignees of *B. Skaije, Assignee, v. Howard*, H. 4 & 5 G. 4. 560
14. Debt on bond conditioned for the payment of money by instalments. Plea, that defendant by W., as his agent, made unlawful contracts for buying and selling shares in the public stocks; that these contracts were not specifically performed, but that W., as the agent of the defendant, voluntarily paid 500*l.* for differences against the form of the statute, and that for securing the repayment of that money to W., the defendant gave his promissory note to W., and that long after the same became due, W. endorsed it to the plaintiffs, and that the plaintiffs afterwards threatened to commence an action upon the note against the defendant; and the defendant, in fear of the action, did, at the request of the plaintiffs, give the bond in question, which the plaintiffs accepted in lieu of the promissory note, and the money secured thereby, they well knowing that the note had been made by the defendant on the occasion, and for the purpose in the plea mentioned: *Held*, that this plea was an answer to the action, inasmuch as the plaintiffs took the promissory note after it was due, and had notice of the illegality of the original consideration before the bond was given.
- At the trial, it appeared in evidence, that the note was given to W. to cover a sum which he, as broker, was to pay for losses on stock-jobbing transactions: *Held*, that this evidence did not support the plea, which stated that the note was given to secure the repayment of money actually paid by W. *Amory and Another v. Meryweather*, H. 4 & 5 G. 4. 573
15. Defendant having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor, and on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose: *Held*, that it could not be read; for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration. *The King on the Prosecution of James Law v. William Mead*, H. 4 & 5 G. 4. 605
16. Where a libel charged the plaintiff with various acts of cruelty to a horse, and amongst others, with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect; the jury having found that it was true in all particulars, except that the eye was not knocked out: *Held*, that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea. *Weaver v. Lloyd*, E. 5 G. 4. 678
17. In case for obstructing the plaintiff's ancient windows, it appeared that the plaintiff and defendant had premises adjoining each other; the plaintiff's house was about four feet within the boundary of her premises. Some witnesses had known it for thirty-eight years, and during all that time there had been windows looking towards the adjoining premises. For a long series of years before the defendant purchased them, those premises had belonged to a family living at a distance, and it was not proved that any member of that family had ever seen them, and they had been occupied by the same tenant for the last twenty years. About two years before the action brought, defendant purchased them and built a house, thereby darkening the plaintiff's rooms: *Held*, that the circumstance of the plaintiff's house not being at the extremity of her premises, did not affect the question, and that after an enjoyment of thirty-eight years, in the absence of any contradictory evidence, the windows were to be considered as ancient windows, and that plaintiff consequently was not entitled to recover. *Cross v. Lewis*, E. 5 G. 4. 686
18. It is a good defence to an action for a malicious arrest, that the defendant, when he caused the plaintiff to be arrested, acted bonâ fide upon the opinion of a legal adviser of competent skill and ability, and believed that he had a good cause of action against the plaintiff. But where it appeared that the party was influenced by an indirect motive in making the arrest, it was held to be properly left to the jury to consider whether he acted bonâ fide upon the opinion of his legal adviser, believing that he had a good cause of action. *Ravens v. Mackintosh*, E. 5 G. 4. 693
19. A communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney, if called as a witness in a cause. *Bramwell and Another, Assignees, v. Lucas and Others*, E. 5 G. 4. 745
20. A parish certificate, purported to be granted in 1761, by A., the only churchwarden, and B., the only overseer of the parish: *Held*, that it must be taken to have been a good certificate, because it may be intended in favour of such an instrument, that by custom there was only one churchwarden in the parish, and that two overseers had been originally appointed, but that one of them died, and that the certificate was granted before the vacancy in the office was filled up. *The King v. The Inhabitants of Catesby*, E. 5 G. 4. 814
21. A promise made after the commencement of an action, is not sufficient to sustain a replication that the defendant (who had pleaded infancy) ratified his contract after he came of age. *Thornton v. Illingworth*, E. 5 G. 4. 824
22. Upon the trial of an appeal at the quarter sessions, the respondent parish proved relief granted to the father of the pauper by the appellant parish before the year 1815. The appellant parish tendered an order of sessions made in the year 1815, quashing an order of justices for the removal of the brother of the pauper to the appellant parish. And they tendered parol evidence to show that the ground of the decision of the court of quarter sessions was, that the father of the pauper had not at that time any settlement in the appellant parish, and consequently, that the son had not any derivative settlement there: *Held*, that even if parol evidence was admissible to prove the ground of the decision of the sessions, still that the order of sessions was not evidence that the

father of the pauper was not settled in the appellant parish in 1815, because the father's settlement was a matter that arose collaterally on the trial of the first appeal. *The King v. The Inhabitants of Knaptoft*, E. 5 G. 4. 883

23. Where, in case, a plaintiff alleged in his declaration that he was possessed of a messuage and premises, and by reason thereof entitled to the use of a stream of water running through the premises for supplying the same with water; and that defendant erected a certain dam higher up the stream, and thereby prevented the water from running in its usual course, in its usual calm and smooth manner, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff; and on issue joined on a plea of not guilty, the jury found that the plaintiff's banks and premises were not injured by the dam erected by the defendant; but added, that defendant had no right to stop the water in the summer-time; the Judge ordered the verdict to be entered for the defendant: *Held*, that the verdict was right, for flowing water is publici juris, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose, and therefore, the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water. *Williams v. Morland*, E. 5 G. 4. 910

24. Trespass for breaking and entering the plaintiff's close. Plea, prescribing in right of a messuage and land for a right of common of pasture on a down or common, whereof the close, &c., before the wrongful separation thereof was parcel, and justifying the trespass, because the close in which, &c., was wrongfully enclosed and separated from the residue of the common. Replication, that the close in the declaration mentioned, in which, &c., was a close called Burgey Cleave Garden, and had for thirty years and more been separated, and divided, and enclosed from the common, and occupied and enjoyed during all that time in severalty and adversely to the persons holding the messuage and land, in respect of which the right of common was claimed. Rejoinder, that the close in which, &c., had not been occupied or enjoyed for thirty years or upwards in severalty or adversely to the person holding the messuage and land, in respect of which the right of common was claimed. The jury found that part of the garden had been enclosed within the thirty years, and that the alleged trespass was committed in that part of the garden only: *Held*, that upon this finding the defendant was entitled to the verdict, because the words of the issue, the close in which, &c., was either an entire or a divisible allegation; if it was an entire allegation, it comprehended the whole of the enclosure to which the name of Burgey Cleave Garden attached, and in that case the plaintiff was bound to prove that the whole of the garden had been enclosed upwards of thirty years; or if it was a divisible allegation, it was confined in its meaning to that spot in which the trespass had been committed; and the jury having found that

that spot had not been enclosed thirty years it was immaterial whether the rest had been so or not. *Richards v. Peake*, E. 5 G. 4. 918

EXCEPTION.

See DEED, 1.

EXECUTION.

See PRACTICE, 4, 6.

EXECUTORS.

See ADMINISTRATOR, 1. ASSUMPSIT, 9. LIMITATIONS, STATUTE OF, 1. SHIP, 2.

FIXTURES.

1. The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house: *Held*, that they passed by the conveyance of the freehold; and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them. A few articles, which were not fixtures, were also left in the house; the demand described them together with the other articles, as fixtures, and the refusal was of the fixtures demanded: *Held*, that upon this evidence the plaintiff could not recover them in this action. *Colegrave v. Dias Santos*, T. 4 G. 4. 76

2. Lessee, who has erected fixtures for the purpose of trade upon the demised premises, and afterwards takes a new lease to commence at the expiration of his former one, which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist to show that they were not intended to pass under the general words of the second demise.

Quære, whether any circumstances de hors the deed can be alleged to show that they were not intended to pass?

Quære, whether lime-kilns erected for the purpose of trade are removable? *Thresher v. The East London Waterworks*, H. 4 & 5 G. 4. 608

FORFEITURE.

Where a lease contained a proviso, that if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made:" *Held*, that the rent having been in arrear for the time specified, an ejectment might be maintained without actual re-entry and without any demand of the rent. After trial the court will not relieve the tenant by staying proceedings in the ejectment, upon payment of the arrears of rent and costs. *Doe dem. Harris v. Masters*, M. 4 G. 4. 490

FRAUDS, STATUTE OF.

1. A. went to the shop of B. and Co., linendrapers, and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate price for each article was agreed upon; some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them: *Held*, first, that this was all

one contract, and therefore within 29 Car. 2, c. 3, s. 17. Secondly, that there was no delivery and acceptance of any of the goods so as to take the case out of the operation of that section. *Baldry v. Parker*, T. 4 G. 4. 37

2. By the conditions of a sale by auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid: *Held*, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other. *Phillips v. Bistelli*, M. 4 G. 4. 511

GAME.

See CONVICTION, 5.

HAMLET, EXTRA-PAROCHIAL.

See HIGHWAY, 1.

HAWKER AND PEDLER.

1. Since the passing of the 50 G. 3, c. 41, the manufacturer of goods is allowed to hawk them in those places only which are mentioned in the twenty-third section of that act.

The defendant was convicted in a penalty of 10*l*. for trading as a hawker, without any license so to do: *Held*, that the conviction was in the proper sum. *The King v. Webb-ell*, T. 4 G. 4. 136

2. A person exposing to sale and selling tea as a hawker, without a license, is liable to the penalty imposed by the 50 G. 3, c. 41, upon hawkers trading without a license, although even with a license he would be liable to a penalty for selling tea in an unentered place.

The defendant was convicted in a penalty of 10*l*.: *Held*, that it was the proper sum. *The King v. McGill*, T. 4 G. 4. 142

HIGHWAY.

An indictment stated that a certain way was an ancient common highway, and that a certain part situate in an extra-parochial hamlet was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it: *Held*, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorially bound to repair; nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair. *Quere*, Whether the inhabitants of the hamlet would be liable to repair at common law, if the indictment had contained the latter allegation. *The King v. The Inhabitants of Kingsmoor*, T. 4 G. 4. 190

HUNDRED, ACTION AGAINST.

Where the owner of certain stacks of hay and corn which were maliciously set on fire, received the amount of his loss from an insurance office: It was held that he might nevertheless maintain an action against the hundred on the 9 G. 1, c. 22. *Clark v. Hundred of Blything*, M. 4 G. 4. 254

ILLEGAL CONTRACT.

See COVENANT, 5.

INDEMNITY ACT.

1. The annual indemnity act is prospective as well as retrospective, and extends to those who may be in default during the time for which it is made, and is not limited to those who had incurred penalties or disabilities before it passed. *In the Matter of Stevenson and Others*, T. 4 G. 4. 34

INDICTMENT.

1. An indictment stated that an ancient bridge situate within the parishes of Machynlleth and Pennegoes, was out of repair, and that the inhabitants of the said parish of Pennegoes and town of Machynlleth *afforsaid*, from time immemorial, by reason of the tenure of certain lands in the said parish of Pennegoes and town of Machynlleth, have repaired the bridges: *Held*, upon error, that the indictment was bad, because it did not appear that the bridge was situate within the town, and therefore that the inhabitants of the town were not liable unless a special consideration were shown; and that here no sufficient consideration was shown, inasmuch as the inhabitants could not hold land, and therefore could not be liable by reason of tenure. *The King v. The Inhabitants of Machynlleth and Pennegoes*, T. 4 G. 4. 166

2. An indictment stated that a certain way was an ancient common highway, and that a certain part situate in an extra-parochial hamlet was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it: *Held*, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorially bound to repair; nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair.

Quere, Whether the inhabitants of the hamlet would be liable to repair at common law, if the indictment had contained the latter allegation. *The King v. The Inhabitants of Kingsmoor*, T. 4 G. 4. 190

INFANT.

- A promise made after the commencement of an action, is not sufficient to sustain a replication that the defendant (who had pleaded infancy) ratified his contract after he came of age. *Thornton v. Illingworth*, E. 5 G. 4. 824

INFERIOR COURT.

See PRACTICE, 28.

INITIAL LETTERS OF CHRISTIAN NAME.

See ANNUITY, 1.

INSOLVENT DEBTORS' COURT, ORDER OF.

See PLEADING, 3.

INSURANCE.

1. Upon a policy of insurance on goods, where the ship, being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the pro

ceeds in payment of these expenses: *Held*, that the underwriter was not answerable for this loss. *Sargay v. Hobson*, T. 4 G. 4. 7

2. In covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A. *Higgins v. Sargent, Esq., and Others*, M. 4 G. 4. 348
3. Where a ship is so much injured by perils of the sea as not to be repairable at all, or not repairable without an expense exceeding her value when repaired, the assured may recover for a total loss without giving notice of abandonment. *Cambridge v. Anderton*, E. 5 G. 4. 691

INTEREST.

See INSURANCE, 2.

JUDGE'S CERTIFICATE.

See COSTS, 2, 6.

JURISDICTION.

1. The Court of Admiralty have, in a cause of possession, jurisdiction to take a vessel from a mere wrongdoer, and to deliver it to the rightful owner; and, therefore, where it appeared upon a rule nisi for a prohibition to restrain the Admiralty Court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it appeared that he was the registered owner, and that the vessel had wrongfully come into the possession of the defendants, and the latter had not pleaded any title, the court discharged the rule for a prohibition. *In the Matter of Blanchard, Baxter, and Others*, T. 4 G. 4. 244

JURY.

1. The panel of tales having been quashed in a special jury case, on the ground of unindifference in the sheriff: *Held*, that a venire facias was properly awarded to the coroner, although two of the special jurors appeared and were sworn on the former occasion.

Upon an award of tales at Nisi Prius, it is not necessary that the tales should be selected out of persons accidentally present; they may be selected out of persons whose presence the sheriff or coroner has taken previous means to obtain. *The King v. Dolby*, T. 4 G. 4. 104

JUSTICES.

1. Prisoners committed to jail for trial, who are able but refuse to work, are not entitled by law to have any food provided for them by the public; and, therefore, where a magistrate reported, as an abuse, to the justices at the quarter sessions, that untried prisoners had been compelled to work at the treadmill, and the justices at sessions ordered that the treadmill should be applied to the employment of other prisoners as well as those sentenced to hard labour; and that those committed for trial who were able to work, and had the means of employment offered them by which they might earn their support, but who refused to work, should be allowed bread and water only, this court refused to grant a mandamus to compel the

justices to order such prisoners any other food. *The King v. The Justices of the North Riding of Yorkshire*, M. 4 G. 4. 286

2. In assumpsit for money had and received, it was proved that Yarmouth has been a borough from time immemorial, and that until the time of Queen Anne, the chief officers of the corporation were two bailiffs; and various charters had confirmed to them all the fees before received by them. By statute 1 Ann. st. 2, c. 7, all fees payable to the bailiffs were to become payable to the mayor when the style of the corporation should be changed, which was done by her charter in the following year. At a meeting duly holden before the defendant, then mayor, (he being by virtue of his office a justice of the peace,) and another justice for granting and renewing the licenses of publicans, the plaintiff applied to have his license renewed, and upon having it done, was required to pay amongst other fees the sum of 4s. to the mayor, which was proved to have been regularly paid for a period of sixty-five years: *Held*, first, that the defendant was not entitled to take any such fee; for the payment for sixty-five years did not raise a presumption that it had been immemorably paid to the bailiffs or mayor of Yarmouth, inasmuch as licenses were not granted until the reign of Ed. 6, and the defendant, as justice of peace, was not entitled to any fee for granting the license. Secondly, that the defendant was not entitled under the 24 G. 2, c. 44, to notice of the action about to be brought against him, for that the fee could not have been taken by him as a justice, *colore officii*. Thirdly, that the payment was not voluntary, so as to preclude the plaintiff from recovering the money in this action. *Morgan v. Palmer*, E. 5 G. 4. 739

KING'S BENCH PRISON.

See PRACTICE, 6.

LANDLORD AND TENANT.

1. Where a lease of premises described them as abutting on "an intended way of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an under lease was granted, describing the premises as abutting on "an intended way," not mentioning the width: *Held*, that the under-lessee was entitled to a convenient way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained. The underlease was of premises "together with all ways thereunto appertaining." A right of way over the original lessor's soil would not pass by those words. Per Holroyd, J. *Harding v. Wilson*, T. 4 G. 4. 96
2. Where A., who held premises under a lease which expired at Midsummer, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till Christmas, and paid rent at Michaelmas and Christmas: *Held*, that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover a quarter's rent due at Lady-day. *Bishop v. Howard*, T. 4 G. 4. 100
3. Plaintiff demised by indenture to B. (defendant's testator) certain premises, to hold for eleven years, from the 29th September,

1809. B. covenanted, amongst other things, that he would not, *during the lease*, sell or convey away from the premises any of the straw which, during the *leased term*, should grow upon the premises, (except wheat-straw and rye-straw,) and that for every load of hay, wheat-straw, and rye-straw, which should be sold or removed off from the premises during the *thereby leased term*, he (B.) would bring back a cart-load of dung; and plaintiff covenanted, that it should be lawful for B. to have the use of the barns, &c., for receiving his crops of corn and hay which should grow upon the premises in the last year before the end of the term thereby granted, and for certain other purposes, until the 1st day of May next after the expiration of the said term, without paying any rent for the same. The fourth breach assigned was that B., *during the said leased term*, to wit: on September 30th, 1820, and on divers other days between that day and May 1st, 1821, did remove off from the premises large quantities of hay, wheat-straw, and rye-straw, without bringing back a cart-load of dung for each load of hay and straw. Plea to so much of that breach as relates to removing hay, &c., *during the said leased term*, that B. did bring back a load of dung for each load of hay, &c., removed; and demurred to the residue of that breach. Joinder in demurrer. Defendants also pleaded to all the breaches except the fourth, and to so much of that as related to removing hay, &c., *during the said leased term*, a release of all causes of action, except such as plaintiff had in respect of B.'s not bringing back to the premises manure for the hay, &c., removed after the 29th September, 1820. Demurrer and Joinder: *Held*, that the plea to the fourth breach answered the whole of that breach, and that therefore the demurrer to the residue was bad: *Held* also that the *leased term* continued for certain purposes until the 1st of May, 1821; so that the release did not extend to all acts of removal done during the *leased term*; and therefore the plea of release did not answer so much of the fourth breach as it affected to answer, and being bad in part was bad in toto. *Earl of St. Germain's v. Willon*, T. 4 G. 4. 216
4. Where a tenant occupied, under an agreement containing a variety of provisions, and amongst others, that he should keep the premises in tenantable repair: *Held*, that the landlord might declare generally "that the defendant became tenant, and in consideration thereof undertook to repair," without setting out the agreement. Where A. held premises under a lease containing a clause of re-entry for want of repairs, and afterwards underlet a part to B., who undertook to repair within three months after notice for that purpose; the premises underlet being out of repair, A.'s landlord threatened to insist upon the forfeiture if they were not repaired, and A. gave notice to B. to repair. The premises, at the expiration of three months from that time, remaining out of repair, A. entered and repaired: *Held*, that he might recover from B. the sum expended on that occasion. After the repairs were done by A., but before the commencement of the action, B. sold his interest in the premises to a person who pulled down and entirely rebuilt them: *Held*, that this did not deprive A. of his right to recover the whole sum expended by him. *Colley v. Streeton*, M. 4 G. 4. 273
5. Where a lease contained a proviso that if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made:" *Held*, that the rent having been in arrear for the time specified, an ejectment might be maintained without actual re-entry, and without any demand of the rent. After trial the court will not relieve the tenant by staying proceedings in the ejectment upon payment of the arrears of rent and costs. *Doe dem. Harris v. Masters*, M. 4 G. 4. 490
6. Lessee, who has erected fixtures for the purpose of trade upon the demised premises, and afterwards takes a new lease to commence at the expiration of his former one, which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist to show that they were not intended to pass under the general words of the second demise. Quære, Whether any circumstances dehors the deed can be alleged to show that they were not intended to pass. Quære, Whether lime-kilns, erected for the purpose of trade, are removable. *Thresher v. The East London Waterworks*, H. 4 & 5 G. 4. 608
7. Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized. *Willoughby v. Backhouse and Marshall*, E. 5 G. 4. 821

LEASE.

See LANDLORD AND TENANT.

LIBEL.

1. A libel imputed that his majesty laboured under mental insanity; and it stated that the writer communicated the fact from authority. Upon the trial of the information, the publication of the libel was proved. It was admitted by the defendants that the statement in the libel was untrue, and they did not offer any evidence to show that they had any authority for making it; and the Judge in his charge to the jury having stated that it was a criminal act to assert falsely of his majesty, or of any other person, that he was insane, and it being admitted by the defendants themselves that the fact stated in the publication was false, in his opinion it was a libel: *Held*, that this direction was correct in point of law, and that the Judge was warranted in saying that the defendants had admitted the charge contained in the libel to be FALSE; for assuming that there might be a distinction between a mere untruth and a criminal untruth, and that the term "false" applied only to the latter, still as the defendants had stated that they communicated the fact from authority, and had not proved that they had any such authority, they must have been guilty of a criminal untruth or falsehood by stating as a fact, the knowledge of which they had derived from authority, that which was untrue, and for which they had no authority.

The jury having retired for a considerable time, returned into court, and desired to know whether it was necessary that there should be a malicious intention in order to constitute a libel; to which the Judge answered, "The man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary:" *Held*, that this answer was correct in point of law, and that the Judge was not bound to answer in the affirmative or negative the abstract question put to him; and assuming that a malicious intention is necessary to constitute a libel, that intention is to be inferred from the mischievous tendency of the publication itself, unless the defendant shows something to rebut such inference, and therefore that the publication of a libel of mischievous tendency having been proved, and the defendant not having shown that he published it from authority, the jury were bound to find that he published it with a malicious intention. *The King v. Harvey and Chapman*, M. 4 G. 4. 257

LIEN.

1. An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against a bankrupt, subsequently to the issuing of the commission, to recover the amount of his bill. *Lambert v. Buckmaster*, H. 4 & 5 G. 4. 616
2. A bill in equity was dismissed with costs. The plaintiff brought an action for the same cause, and recovered a verdict. The costs in equity may be set off against the judgment, subject to the lien of the attorney. *Harrison v. Bainbridge*, E. 5 G. 4. 800

LIMITATIONS, STATUTE OF.

1. A. and B. made a joint and several promissory note. A. died, and, ten years after his death, B. paid interest upon the note. In an action brought upon the note against the executors of A., it was held that the payment of interest by B. did not take the case out of the statute of limitations, so as to make A.'s executors liable. *Atkins and Others, Executors, v. Tredgold and Others, Executors*, T. 4 G. 4. 23
2. A., by means of a misrepresentation, received of B. and several other persons, his tenants, various sums of money, to which he was not entitled. B. applied to him to have the money which he had so paid returned, saying that he and the other tenants had been induced to pay more than was due. A. replied, that if there was any mistake it should be rectified: *Held*, this obviated the statute of limitations as to payments made by the other tenants as well as by B.

Plaintiff, an administratrix, after the death of the intestate, made one such wrongful payment as before mentioned, out of the assets; *Held*, that she might recover it in her representative character.

Upon a replication, that the defendant did promise within six years, to a plea of the statute of limitations, fraud in the defendant cannot be set up as an answer to the plea.

Quere, Whether it would be a good answer if specially replied. *Clark, Administratrix, v. Hougham*, T. 4 G. 4. 149

MALICIOUS ARREST.

See ACTION ON THE CASE, 3.

MANDAMUS.

1. Prisoners committed to jail for trial who are able, but refuse to work, are not entitled by law to have any food provided for them by the public; and therefore where a magistrate reported, as an abuse, to the justices at the quarter sessions, that untried prisoners had been compelled to work at the treadmill, and the justices of sessions ordered that the treadmill should be applied to the employment of other prisoners, as well as those sentenced to hard labour; and that those committed for trial who were able to work, and had the means of employment offered them by which they may earn their support, but who refused to work, should be allowed bread and water only, this Court refused to grant a mandamus to compel the justices to order such prisoners any other food. *The King v. The Justices of the North Riding of Yorkshire*, M. 4 G. 4. 286
2. By charter, a borough was constituted a body corporate, to have perpetual succession by the name of the mayor and free burgesses of the borough of F. Nine of the free burgesses were to be chosen aldermen. One of the aldermen was to be called mayor. The mayor and aldermen were to form the common council; a person learned in the laws of England was to be recorder. The charter then authorized the mayor and recorder, or their respective deputies, and the rest of the aldermen of the borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time, and at all times thereafter, as often, and when to them should seem fit and necessary, to nominate, choose, and prefer so many, and such persons to be free burgesses of the borough, as they pleased, and to those free burgesses so to be chosen, to administer an oath for their fidelity to the borough. Nine persons were nominated as the first aldermen, one person as recorder, and five persons the first free burgesses; and in case any one or more of the aldermen should die, or be removed from his office, the mayor, recorder, justices of peace, and the rest of the aldermen, or the greater part of them, to elect one other of the free burgesses, inhabitants of the borough, for an alderman, to supply the number of nine. The alderman so chosen taking the oaths before the mayor, recorder, or one of the justices of the peace of the borough for the time being, or before two or more aldermen, or for want of mayor, recorder, justices, and aldermen, before three or more free burgesses, inhabitants of the borough, to execute the office, and the mayor, the ex-mayor, the recorder, and their deputies, and the senior alderman, and the senior free burgess were to be justices of the peace. It appeared by affidavits, that the body corporate had for three years been reduced to the number of six aldermen and four free burgesses, and that one of the aldermen was in a

dangerous state of health, and was upwards of seventy years of age, and incapable of performing the duties of alderman and justice of the peace; that of the four burgesses, two were upwards of seventy years of age, and that another was not an inhabitant of the borough. The Court refused to grant a mandamus to compel the mayor and aldermen to proceed to the election of free burgesses, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election. *The King v. The Mayor, Recorder, and Aldermen of the Borough of Fowey*, H. 4 & 5 G. 4. 584

2. Where the charter of a corporation provided that there should be a high steward and an under steward, and imposed upon the latter various judicial and ministerial duties, and did not give him power to appoint a deputy: *Held*, that he could not appoint a deputy generally to discharge all the ministerial duties of his office; although a by-law of the corporation required that "he or his sufficient deputy" should attend at every court, to execute the duties of the office.

Quære, Whether he could have made such an appointment for the discharge of any particular ministerial duty? *The King v. Mayor, &c., of Gravesend*, H. 4 & 5 G. 4. 502

MEMORIAL.

See ANNUITY, 1, 2, 3, 4.

MONEY HAD AND RECEIVED.

See ASSUMPT., 2.

NON ARRIVAL.

See CHARTER-PARTY.

NOTICE OF APPEAL.

See APPEAL, 3.

NOTICE TO QUIT.

See EVIDENCE, 6.

OUTLAWRY.

See PRACTICE, 8.

OVERSEERS.

1. A local act directed that the then overseers of the parish of W. should continue to be overseers for the remainder of the current year, and until two others should be appointed, and that two overseers should be appointed annually: *Held*, that this act did not repeal the statute 43 Elis. c. 2, s. 1, and that an appointment of four overseers for the parish of W. was valid. *The King v. Pinney and Another*, M. 4 G. 4. 322
2. Overseers of the poor are bound to endeavour to find work for the able-bodied poor who are out of employment. *Quære*, Whether they can legally give relief to such persons, otherwise than by setting them to work and paying them for their labour. *The King v. Collett, Clerk*, M. 4 G. 4. 324
2. A parish certificate purported to be granted in 1761 by A., the only churchwarden, and B., the only overseer of the parish: *Held*, that it must be taken to have been a good certificate, because it may be intended in favour of such an instrument, that by custom there was only one churchwarden in the parish, and that two overseers had been originally appointed, but that one of them died, and that the certificate was granted before the vacancy in the office was filled up. *The*

King v. The Inhabitants of Cateby, E. 5 G. 4. 814

PARISH CERTIFICATE.

See EVIDENCE, 23.

PAROL ASSIGNMENT.

See COPYRIGHT, 1.

PARTNERSHIP.

1. Where A. and B. were partners, but the whole of the business was carried on by and in the name of A., B. never appearing to the world as a partner; and at the dissolution of the partnership, by effluxion of time, all the partnership stock and effects, by agreement between them, were left in A.'s hands, who was to receive and pay all the debts due to and from the concern, and to repay by instalments the capital brought in by B.; A. having continued to carry on the business as before for a year and a half, when he became a bankrupt: *Held*, that all the partnership property and effects so left in A.'s hands, and also the debts due to the concern, passed to his assignees, being in the order and disposition of the bankrupt within the intent and meaning of the 21 Jac. 1, c. 19, s. 11. *Ex parte Enderby, in the Matter of Gilpin*, M. 4 G. 4. 389
2. An agreement between A., a merchant, and B., a broker, that the latter should purchase goods for the former, and, in lieu of brokerage, should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses, does not vest in B. any share in the property so purchased, or in the proceeds of it, although it may render him liable as a partner to third persons. *Smith and Another, Assignees, v. Watson and Another*, M. 4 G. 4. 401
3. A. and B. having been in partnership, dissolved it on the 14th of July, and the dissolution was advertised on the 17th. On the 16th a bill was drawn in the names of A. and B., which was accepted and paid by C. without consideration. C. afterwards sued A. and B. for money lent. A. pleaded bankruptcy and certificate. B. non-assumpsit. Noll. pro. as to A. *Held*, that he was a competent witness for B., to prove that C. accepted the bill for his (A.'s) accommodation and not for that of B. For that B. was only a surety, and might have proved under A.'s commission. *Moody v. King and Porter*, H. 4 & 5 G. 4. 558

PAYMENT.

See APPROPRIATION.

PLEADING.

1. Where a declaration against a sheriff for taking insufficient pledges in a replevin-bond stated that the party replevying levied his plaint "at the next county court, to wit, at the county court holden on, &c., before A., B., C., and D., suitors of the court," which plaint was afterwards removed by re. fa. lo.; and by that record it appeared that the plaint was levied at a court holden before E., F., G., H.: *Held*, that the variance was immaterial, for that it was unnecessary to state or prove the names of the suitors, and that they might be rejected as surplusage. *Draper v. Garratt and Another*, T. 4 G. 4. 2

- 2 Declaration, that for certain hire and reward defendants undertook to carry goods from London and deliver them safely at Dover. The contract proved was, to carry and deliver safely (fire and robbery excepted): *Held*, that this was a variance. *Latham v. Rutley*, T. 4 G. 4. 20
- 3 Declaration stated that the defendant being the clerk of the court for the relief of insolvent debtors, wrongfully and maliciously intending to injure the plaintiff, and to cause one S. C., in custody at the suit of the plaintiff, to be discharged out of custody without paying plaintiff his damages and costs, wrongfully and unlawfully issued an order purporting to be an order from that court, and purporting that the prisoner should be discharged from custody; whereas in truth and in fact, the court did not pronounce any such order, nor give any authority to the defendant to issue the same, by reason whereof the prisoner was discharged from custody: *Held*, upon error, brought upon a judgment of C. P., given for the defendant upon demurrer to the declaration, that it was not necessary to aver that the order had been set aside by the court; for the order was to be considered the act of the officer, and not of the court. *Whitelegg v. Richards*, T. 4 G. 4. 45
- 4 The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house: *Held*, that they passed by the conveyance of the freehold; and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them. A few articles, which were not fixtures, were also left in the house; the demand described them together with the other articles, as fixtures, and the refusal was of the fixtures demanded: *Held*, that upon this evidence the plaintiff could not recover them in this action. *Colegrave v. Dias Santos*, T. 4 G. 4. 76
- 5 The court will not compel a defendant to verify his plea. *Merington v. Becket*, T. 4 G. 4. 81
- 5 It is not necessary in a declaration upon a post obit bond, to aver the death of the person upon whose death the money secured by the bond was to become payable.
A post obit bond (upon which a forfeiture has taken place), is not within the statute of the 8 & 9 W. 3, c. 11; and therefore it is unnecessary to suggest breaches.
Semble, that such a bond is within the 4 & 5 Anne, c. 15. *Murray, Administrator, v. The Earl of Stair*, T. 4 G. 4. 82
- 7 Where a lease of premises described them as abutting on "an intended way of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an under-lease was granted, describing the premises as abutting on "an intended way," not mentioning the width: *Held*, that the under lessee was entitled to a convenient way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained. *Harding v. Wilson*, T. 4 G. 4. 96
- 8 Where A., who held premises under a lease

which expired at Midsummer, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till Christmas, and paid rent at Michaelmas and Christmas: *Held*, that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover a quarter's rent due at Lady-day. *Bishop v. Howard*, T. 4 G. 4. 100

- 9 A., by means of a misrepresentation, received of B. and several other persons, his tenants, various sums of money, to which he was not entitled. B. applied to him to have the money which he had so paid returned, saying that he and the other tenants had been induced to pay more than was due. A. replied, that if there was any mistake it should be rectified: *Held*, that this obviated the statute of limitations as to payments made by the other tenants as well as by B.

Plaintiff, an administratrix, after the death of the intestate, made one such wrongful payment as before mentioned, out of the assets; *Held*, that she might recover it in her representative character.

Upon a replication, to a plea of the statute of limitations, that the defendant did promise within six years, fraud cannot be set up as an answer to the plea.

Quære, Whether it would be a good answer if specially replied. *Clark, Administratrix, v. Hougham*, T. 4 G. 4. 149

- 10 An indictment stated that an ancient bridge, situate within the parishes of Machynlleth and Pennegoes, was out of repair, and that the inhabitants of the said parish of Pennegoes and town of Machynlleth *aforesaid*, from time immemorial, by reason of the tenure of certain lands in the said parish of Pennegoes and town of Machynlleth, have repaired the bridges: *Held*, upon error, that the indictment was bad, because it did not appear that the bridge was situate within the town, and therefore that the inhabitants of the town were not liable unless a special consideration were shown; and that here no sufficient consideration was shown, inasmuch as the inhabitants could not hold land, and therefore could not be liable by reason of tenure. *The King v. The Inhabitants of Machynlleth and Pennegoes*, T. 4 G. 4. 166
- 11 The declaration stated that the plaintiff and defendant, by articles of agreement, (reciting that several actions, arising out of the same transaction, had been brought, and defended by the plaintiff, defendant, G. A. and D. A., and that in one of them the assignees of one J. T., a bankrupt, recovered against the now plaintiff 2500*l.* and that disputes existed between the now plaintiff and defendant respecting the value of the goods and stock which each had received from a certain farm, and also concerning the proportion which each was to pay of the said sum of 2500*l.*, according to an agreement entered into between them before the trial, and also concerning the costs of bringing and defending the actions above mentioned,) submitted themselves to the award of J. T., J. R., and T. C., respecting the said matters. That the arbitrators, taking the said matters into consideration, awarded that the defendant should pay the plaintiff 444*l.*: that five-eighths parts of the costs of the several actions before mentioned should be paid by the plaintiff, and

- three-eighths by defendant; that the sums already expended by either of them should be allowed as part payment of his proportion; and that when the sum of 444l. and the costs were paid, mutual releases should be given. On demurrer: *Held*, that the plaintiff was entitled to recover; for that, as to the first part of the award, nothing appeared on the declaration to show that the arbitrators had not awarded the sum of 444l. after taking into consideration the value of the stock and goods, and that it was sufficiently certain; for the plaintiff being originally liable to pay the whole sum of 2500l., must remain liable to pay all but the 444l. awarded to him. As to the second part respecting the costs: *Held*, that it was sufficiently certain, for it would become so upon taxation of the costs by the proper officer; and that it would be final or otherwise according as there were or were not disputes about the sums already laid out. If there were any such disputes, or if the arbitrators did not take into consideration all the matters referred, that should have been pleaded. *Cargay v. Aitchison*, T. 4 G. 4. 170
12. Debt on a bond conditioned for the performance of an award, to be made within a limited time. The declaration, after setting out the condition, stated that before that time expired, the parties to the bond by deed agreed to give the arbitrators further time for making the award, and that an award was made within the extended time; and alleged non-performance: *Held*, upon demurrer, that the action was maintainable upon the bond. *Greig v. Talbot*, T. 4 G. 4. 179
13. An indictment stated that a certain way was an ancient common highway, and that a certain part, situate in an extra-parochial hamlet, was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it: *Held*, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorably bound to repair; nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair.
- Quere, Whether the inhabitants of the hamlet would be liable to repair at common law, if the indictment had contained the latter allegation. *The King v. The Inhabitants of the Extra-parochial Hamlet of Kingsmoor*, T. 4 G. 4. 190
14. Plaintiff demised by indenture to B. (defendant's testator) certain premises, to hold for eleven years, from the 29th September, 1809. B. covenanted, amongst other things, that he would not, *during the lease*, sell or convey away from the premises any of the straw which, during the *leased term*, should grow upon the premises, (except wheat-straw and rye-straw,) and that for every load of hay, wheat-straw, and rye-straw, which should be sold or removed off from the premises during the *thereby leased term*, he (B.) would bring back a cart-load of dung; and plaintiff covenanted, that it should be lawful for B. to have the use of the barns, &c., for receiving his crops of corn and hay which should grow upon the premises in the last year before the end of the term thereby granted, and for certain other purposes, until the 1st day of May next after the expiration of the said term, without paying any rent for the same. The fourth breach assigned was that B., *during the said leased term*, to wit: on September 30th, 1820, and on divers other days between that day and May 1st, 1821, did remove off from the premises large quantities of hay, wheat-straw, and rye-straw, without bringing back a cart-load of dung for each load of hay and straw. Plea to so much of that breach as relates to removing hay, &c., *during the said leased term*, that B. did bring back a load of dung for each load of hay, &c., removed; and demurrer to the residue of that breach. Joinder in demurrer. Defendants also pleaded to all the breaches except the fourth, and to so much of that as related to removing hay, &c., *during the said leased term*, a release of all causes of action, except such as plaintiff had in respect of B.'s not bringing back to the premises manure for the hay, &c., removed after the 29th September, 1820. Demurrer and Joinder: *Held*, that the plea to the fourth breach answered the whole of that breach, and that therefore the demurrer to the residue was bad: *Held* also that the *leased term* continued for certain purposes until the 1st of May, 1821; so that the release did not extend to all acts of removal done during the *leased term*; and therefore the plea of release did not answer so much of the fourth breach as it affected to answer, and being bad in part was bad in toto. *Earl of St. Germain's v. Willan and Another, Executors*, T. 4 G. 4. 216
15. Where the owner of certain stacks of hay and corn, which were maliciously set on fire, received the amount of his loss from an insurance office: *Held*, that he might nevertheless maintain an action against the bundred on the 9 G. 1, c. 22. *Clark v. The Inhabitants of Blything*, M. 4 G. 4. 254
16. In the parish of A., two churchwardens were elected for the township of B., and two others for the rest of the parish. Separate rates were made for these divisions: *Held*, that the churchwardens elected for the township of B. might maintain an action against their predecessors for money remaining in their hands, and were not bound to make all the present or late churchwardens of the parish plaintiffs or defendants. *Astle and Another v. Thomas and Baldwin*, M. 4 G. 4. 271
17. Where a tenant occupied, under an agreement containing a variety of provisions, and amongst others, that he should keep the premises in tenantable repair: *Held*, that the landlord might declare generally "that the defendant became tenant, and in consideration thereof undertook to repair," without setting out the agreement. Where A. held premises under a lease containing a clause of re-entry for want of repairs, and afterwards underlet a part to B., who undertook to repair within three months after notice for that purpose; the premises underlet being out of repair, A.'s landlord threatened to insist upon the forfeiture if they were not repaired, and A. gave notice to B. to repair. The premises, at the expiration of three months from that time, remaining out of repair, A. entered and repaired: *Held*, that he might recover from B. the sum expended on that occasion. After the repairs were done by A., but before the commencement of the

- action, B. sold his interest in the premises to a person who pulled down and entirely rebuilt them: *Held*, that this did not deprive A. of his right to recover the whole sum expended by him. *Colley and Another v. Streton and Others*, M. 4 G. 4. 273
18. A count in slander, charging that defendant had imposed upon the plaintiff the crime of felony, is good after verdict. *Blissard v. Kelly*, M. 4 G. 4. 283
19. Assumpsit by the endorsee against the maker of a promissory note, payable to A. B., or his order. Plea, first, non-assumpsit; and secondly, that A. B. became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to endorse the promissory note before the time of endorsement became vested in the assignees, whereby the endorsement by A. B. was void, and created no right in the plaintiffs to sue. Replication to the last plea, that the endorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record. First, because the defendant who had made the note payable to A. B., or his order, was estopped from saying that A. B. was not competent to make an order. Secondly, because the property acquired by a bankrupt subsequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons. *Drayton and Another v. Dale*, M. 4 G. 4. 293
20. Trespass for breaking and entering the plaintiff's manor. Pleas, first, general issue; second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public navigable river from time immemorial, and that there is in that part of the port which is within the manor, an ancient work necessary for the preservation of the port, and for the safety and convenience of the ships resorting to it: that this work was, at the several times when, &c., in decay; that plaintiff would not repair it, but neglected so to do, wherefore defendants entered and repaired. Replication, *de injuria*. Verdict for plaintiff on first plea, and for defendants on the second: *Held*, that plaintiff was entitled to judgment non obstante verdicto, as the second plea did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port. Quere, Whether the plea would have been good had it contained those allegations. *The Earl of Lonsdale v. Nelson*, M. 4 G. 4. 302
21. In covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A. *Higgins v. Sargent*, M. 4 G. 4. 348
22. Where A. bought goods of a trader who had previously committed an act of bankruptcy, and paid for them bona fide without knowledge of the bankruptcy: *Held*, that the assignees, under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 Jac. 1, c. 15, s. 14. *Cash and Another, Assignees, v. Young*, M. 4 G. 4. 413
23. A customer was in the habit of endorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid; and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson and Others v. Giles and Others*, M. 4 G. 4. 422
24. Where certain persons who had been slaves in a foreign country, where slavery was tolerated by law, escaped thence, and got on board a British ship of war, on the high seas: *Held*, that a British subject resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship for harbouring the slaves after notice. *Forbes v. Cochrane*, M. 4 G. 4. 449
25. Declaration stated, that by agreement between plaintiff and G. G., plaintiff agreed to sell and deliver to G. G. a lace machine for £200.; to be paid thus, 40*l.* on delivery, and the residue by weekly payments of 1*l.*, which were to be paid to defendant, as trustee for the plaintiff, and in case of any default plaintiff was to have back the machine; and in consideration of the premises, and of plaintiff, at the request of the defendant, appointing him to receive the weekly instalments, defendant promised the plaintiff to take the machine and pay the balance, should there be any default by G. G. in the weekly payments: *Held*, that this promise was nudum pactum, and void. *Bates v. Cort*, M. 4 G. 4. 474
26. Declaration in assumpsit by the assignees of a bankrupt, stated that the defendant was indebted to the bankrupt before his bankruptcy in 1000*l.* for goods sold, &c., and concluded by stating that the plaintiff had sustained damage to that extent. Plea, that before the bankruptcy upon an account stated between the bankrupt and the defendant, the latter was found to be indebted to the bankrupt in the sum of 400*l.*, for which said sum the bankrupt drew a bill upon the defendant, which the defendant accepted for and on account of the said several promises in the declaration mentioned, by reason whereof the defendant became liable to pay the bill. The plaintiff having replied over, it was held upon demurrer to the replication, that the plea was

bad, inasmuch as it was pleaded to the whole of the demand, and the giving of a bill for 400*l.* was not in point of law a satisfaction of 1000*l.*, the amount of the debt claimed. *Thomas and Another, Assignees, v. Heathorn*, M. 4 G. 4. 477

27. Declaration upon a bill of exchange drawn by the plaintiffs upon one F. W., endorsed by the plaintiffs to defendant, and re-endorsed by him to the plaintiffs. Averment, that at the time of the drawing of the said bill, and of the endorsement by the defendant to the plaintiffs, it had been agreed between them that the name of the defendant should be endorsed upon the bill as a security to the plaintiffs for the due payment thereof by F. W., and that the bill was so endorsed by the defendant under such agreement, and for such purpose only, and that the plaintiffs took and received the bill in satisfaction of such debt of the said F. W., upon the faith that the defendant would endorse the same as such security, and that the endorsement by plaintiffs was made without any consideration, and for the purpose only of procuring the endorsement of the defendant, and making the bill negotiable. Averment, that the bill was presented to F. W., and that he refused to pay, and that notice of such refusal was given to the defendant. and he thereby became liable to pay, and being liable, promised: *Held*, upon demurrer, that this declaration was bad, inasmuch as, if the action was founded upon the bill, the plaintiff could only recover according to the custom of merchants, and by that custom the plaintiffs, as endorsers and drawers, would be liable to pay the amount of the bill to the defendant; and if the action was considered as founded upon the special contract, it was not maintainable, inasmuch as there was not any consideration for the defendant's endorsement. *Britten and Another v. Webb*, M. 4 G. 4. 483

28. Where in case for slander of title it appeared by the declaration that the plaintiff had a certain interest in the premises, and that by an agreement between himself and the defendant, (from whom he derived that interest,) he had a clear right to dispose of the whole of that interest, but only a doubtful right to dispose of any portion of it, and the plaintiff averred that he put up his said interest to auction, and that defendant published a libel of and concerning his right to sell the said interest; the evidence being that he offered for sale a portion of that interest only: *Held*, that this was a fatal variance. *Millman v. Pratt*, M. 4 G. 4. 486

29. By a local act for building a chapel, the trustees therein mentioned were authorized to appoint a treasurer, clerk, and other officers, and out of the money to be received by virtue of the act to pay such salaries to them as they (the trustees) should think reasonable, and out of the same fund they were to pay to the curate a yearly salary not less than 150*l.*: they were authorized to borrow any sum at interest, not exceeding 30,000*l.*; which moneys so borrowed, and the interest thereof, were to be made payable out of the burial-fees, and out of rates and assessments to be made in pursuance of the act. They were also authorized to grant annuities, provided the money so raised by

annuities did not exceed the whole sum intended to be raised for the purposes of the act. They were authorized also to make an assessment on the occupiers of houses, lands, &c. within the parish, not exceeding 2*s.* 6*d.* in the pound on the yearly value and the rates were to be applied by them to the purposes of that act during such time as any of the moneys to be borrowed upon the credit of the act should remain unpaid or the annuity granted should have continuance; and by another clause, the trustees were empowered to take a distress for the non-payment of the rates. The trustees appointed under this act raised a sum of 32,636*l.*, partly by annuity and partly by borrowing upon common interest; and made a rate to pay the annuities and the interest upon the whole money borrowed. A distress having issued, the plaintiff replevied, and the defendant avowed as collector of the rates imposed by the act. The plaintiff, after setting out several clauses in the act of parliament, pleaded that before the making of the assessment, the trustees had wrongfully borrowed more than the sum of 30,000*l.* which, by the act, they were authorized to do, viz., 136 by annuities and 2,500*l.* by borrowing, and that the rates were made amongst others, for the purpose of paying the said annuities and money borrowed. Replication, that the burial-fees were insufficient to answer the purposes of the act, and that the annuities granted by the act were in existence, and that it was necessary for the trustees to raise money by assessments, in order to carry into effect the purposes of the act; and that the assessments were duly made pursuant to the act, and without stating that the rates were made for the purpose of paying the annuities and money borrowed, or any other purpose whatever: *Held*, upon demurrer, that the plaintiff was entitled to judgment, inasmuch as the act of parliament only authorized the trustees to borrow a specific sum, and the rate having been made to pay the interest due upon the whole sum borrowed, was bad in toto, although the defect did not appear upon the face of it. *Richter v. Hughes*, M. 4 G. 4. 499

30. By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds: *Held*, that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce *à mensa et thoro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity. *See, Clerk v. Thurlow*, H. 4 & 5 G. 4. 547

31. In assumpsit on a promissory note, defendant pleaded non-assumpsit, and having made up the issue, ruled plaintiff to enter it, who by mistake entered a plea of not guilty. Defendant signed judgment of non-pros.: *Held*, that the plea entered was substantially the

- same as the other, and the judgment was set aside. *Aaron v. Chausdy*, H. 4 & 5 G. 4. 562
32. Debt on bond conditioned for the payment of money by instalments. Plea, that defendant by W., as his agent, made unlawful contracts for buying and selling shares in the public stocks; that these contracts were not specifically performed, but that W., as the agent of the defendant, voluntarily paid 500*l.* for differences against the form of the statute, and that for securing the repayment of that money to W., the defendant gave his promissory note to W., and that long after the same became due, W. endorsed it to the plaintiffs, and that the plaintiffs afterwards threatened to commence an action upon the note against the defendant; and the defendant, in fear of the action, did, at the request of the plaintiffs, give the bond in question, which the plaintiffs accepted in lieu of the promissory note, and the money secured thereby, they well knowing that the note had been made by the defendant on the occasion, and for the purpose in the plea mentioned: *Held*, that this plea was an answer to the action, inasmuch as the plaintiffs took the promissory note after it was due, and had notice of the illegality of the original consideration before the bond was given.
- At the trial, it appeared in evidence, that the note was given to W. to cover a sum which he, as broker, was to pay for losses on stock-jobbing transactions: *Held*, that this evidence did not support the plea, which stated that the note was given to secure the repayment of money actually paid by W. *Amory and Another v. Meryweather*, H. 4 & 5 G. 4. 573
33. In a conviction under the 3 G. 4, c. 110, it is necessary that the offence should appear to have been proved on the oath of one or more credible witnesses, and therefore, where the conviction stated, "that R. A. was convicted of carrying brandy liable to seizure," (without saying upon oath,) and proceeded, "and it is this day, in like manner, also proved, on the oath of J. H., that the brandy was taken from R. A., and that he was detained by an officer of the navy, &c.:" *Held*, that carrying the brandy was the offence, and as that was not stated to have been proved on oath, the conviction was bad, and that R. A. (having been committed to prison) was entitled to be discharged. *Ex parte Aldridge*, H. 4 & 5 G. 4. 600
34. In an action by original, if the defendant does not appear, the bail-bond is forfeited on the quarto die post, the other four days being allowed merely *ex gratia*; and therefore where a commission of bankruptcy issued against one of the bail to the sheriff after the quarto die post, but within four days, it was held that the penalty of the bond was a debt provable under the commission, and therefore barred by the certificate. *Coulson, Assignee of the Sheriff of Middlesex, v. Hammon*, H. 4 & 5 G. 4. 626
35. Where a libel charged the plaintiff with various acts of cruelty to a horse, and amongst others, with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect; the jury having found that it was true in all particulars, except that the eye was not knocked out: *Held*, that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea. *Weaver v. Lloyd*, E. 5 G. 4. 678
36. The plaintiff's goods were distrained for poor rates, and upon the sale produced 4*l.* 7*s.* more than was necessary to satisfy the levy. The defendants tendered to him 3*l.* 14*s.* which he refused to accept, saying that it was too late, but did not then, or at any other time, demand a settlement of the account and the payment of the overplus: *Held*, that the 27 G. 2, c. 20, prevented the plaintiff from recovering without making a demand before the commencement of the action, and that the tender did not make such demand unnecessary. *Simpson v. Routh and Others*, E. 5 G. 4. 683
37. Where the parish clerk refused to read in a church a notice which was presented to him for that purpose, and the person presenting it read it himself, at a time when no part of the church service was actually going on: *Held*, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards in order to take him before a magistrate. *Williams v. Glenister*, E. 5 G. 4. 699
38. By the general turnpike act, the trustees of roads are authorized to divert, shorten, alter or improve the course or path of any of the roads under their management, and divert, shorten, vary, alter, and improve the course or path of any roads through or over any commons, or waste grounds, or uncultivated lands, without making satisfaction for the same, and through or over any private lands, tendering or making satisfaction to the owners thereof, and persons interested therein for the damage sustained thereby: *Held*, that, under this clause, the trustees authorized to lower hills and raise hollows: *Held*, secondly, that the trustees are not liable to an action for a consequential injury resulting from an act which they are authorized to do. *Boulton v. Croother*, E. 5 G. 4. 703
39. In an information on the 5 Ann. c. 14, a. 2, against a carrier between Norwich and London, for having game in his possession as carrier, it is not necessary to aver that the defendant is not a person qualified to kill game, nor that he had the game in his possession knowingly. The evidence for the prosecution was, that game was found in the defendant's wagon at an intermediate place between Norwich and London: *Held*, that there was sufficient *prima facie* evidence that the defendant had it in his possession as carrier. The evidence for the defendant was, that his book-keeper living at that place did not know of any game having been put in there. Neither the driver of the wagon nor his assistant was called as a witness: *Held*, that this evidence did not vary the case, and that the defendant was properly convicted of having the game in his possession as carrier. *The King v. Marsh*, E. 5 G. 4. 717
40. Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized. *Willoughby v. Backhouse and Marshall*, E. 5 G. 4. 821

41. A promise made after the commencement of an action, is not sufficient to sustain a replication that the defendant (who had pleaded infancy) ratified his contract after he came of age. *Thornton v. Hingworth*, E. 5 G. 4. 824
42. An Author publishes his work in a foreign country in 1814, and afterwards agrees to sell A. the exclusive right of printing the same work in this country, but no agreement or consent in writing was then entered into. A. publishes the work in September, 1814, in England. In 1818, B. publishes the same in England. In 1823, the author, by an agreement in writing, assigns to A. the exclusive right of printing the work in England: *Held*, that A. did not, by the parol consent given by the author in 1814, acquire the exclusive right of publishing the work in England: secondly, that that could not be deemed a publication by the author, not being made on his account, or for his benefit: thirdly, that the publication by B. in 1818 was a lawful publication; and, fourthly, that the author could not afterwards, in 1822, by making a valid assignment to A., enable him to maintain an action against B. for selling a copy of the same work after such assignment was executed. *Clementi v. Walker*, E. 5 G. 4. 861
43. The Court will not allow a plea in abatement to an indictment for a misdemeanor to be amended. Where a defendant pleads in abatement to an indictment for a misdemeanor, that he is a peer, he must state that he is a peer of the United Kingdom, and the mode in which he derives his title. *The King v. Cooke*, E. 5 G. 4. 871
44. Where, in case, a plaintiff alleged in his declaration that he was possessed of a messuage and premises, and by reason thereof entitled to the use of a stream of water running through the premises for supplying the same with water; and that defendant erected a certain dam higher up the stream, and thereby prevented the water from running in its usual course, in its usual calm and smooth manner, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff; and on issue joined on a plea of not guilty, the jury found that the plaintiff's banks and premises were not injured by the dam erected by the defendant; but added, that defendant had no right to stop the water in the summer-time; the Judge ordered the verdict to be entered for the defendant: *Held*, that the verdict was right, for flowing water is publici juris, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose, and therefore, the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water. *Williams v. Morland*, E. 5 G. 4. 910
45. In an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff being a trader, and being indebted to the defendant in the sum of 100*l.*, became bankrupt, wherefore defendant sued out the commission. Replication, *de injuria sua propria*. Demurrer, assigning for cause that

the plaintiff by the replication had attempted to put in issue three distinct facts,—the act of bankruptcy, the trading, and the petitioning creditors' debt: *Held*, that these three facts connected together, constituted but one entire proposition, and that the replication was therefore good. *O'Brien v. Saxon*, E. 5 G. 4. 908

46. Trespass for breaking and entering the plaintiff's close. Plea, prescribing in right of a messuage and land for a right of common of pasture on a down or common, whereof the close, &c., before the wrongful separation thereof was parcel, and justifying the trespass, because the close in which, &c., was wrongfully enclosed and separated from the rest of the common. Replication, that the close in the declaration mentioned, in which, &c., was a close called Burgey Cleave Garden, and had for thirty years and more been separated, and divided, and enclosed from the common, and occupied and enjoyed during all that time in severalty and adversely to the persons holding the messuage and land, in respect of which the right of common was claimed. Rejoinder, that the close in which, &c., had not been occupied or enjoyed for thirty years or upwards in severalty or adversely, as alleged in the replication. The jury found that part of the garden had been enclosed within the thirty years, and that the alleged trespass was committed in that part of the garden only: *Held*, that upon this finding the defendant was entitled to the verdict, whether the words of the issue, the close in which, &c., constituted an entire or a divisible allegation; if it was an entire allegation, it comprehended the whole of the enclosure to which the name of Burgey Cleave Garden attached, and in that case the plaintiff was bound to prove that the whole of the garden had been enclosed upwards of thirty years; or if it was a divisible allegation, it was confined in its meaning to that spot in which the trespass had been committed; and the jury having found that that spot had not been enclosed thirty years, it was immaterial whether the rest had been so or not. *Richards v. Peate*, E. 5 G. 4. 918
47. Declaration stated that plaintiff was possessed of a close of land with trees growing thereon, to which rooks had been used to resort and settle and build nests, and rear their young in the trees, by reason whereof the plaintiff had been used to kill and take the rooks and the young thereof, and great profit and advantages had accrued to him; yet that defendant wrongfully and maliciously intending to injure the plaintiff, and alarm and drive away the rooks, and to cause them to forsake the trees of the plaintiff, wrongfully and unjustly caused guns loaded with gunpowder to be discharged near the plaintiff's close, and thereby disturbed and drove away the rooks, whereby plaintiff was prevented from killing the rooks and taking the young thereof. Plea, not guilty: *Held*, on motion in arrest of judgment, that this action was not maintainable, inasmuch as rooks were a species of birds *feræ nature* and the plaintiff could not have any property in them. *Hannam v. Meckett*, E. 5 G. 4. 934

POOR.

Overseers of the poor are bound to endeavour to find work for the able-bodied poor who are out of employment. *Quere*, Whether they can legally give relief to such persons, otherwise than by setting them to work and paying them for their labour. *The King v. Collatt, Clerk*, M. 4 G. 4. 324

POOR RATE.

1. In the parish of W. the poor rates, according to an ancient custom, had always been made without respect to the value of property in the parish, but according to the supposed ability of the party charged; *Held*, that persons so rated, were not rated in respect of any annual rent, profit, or value, within the meaning of the 58 G. 3, c. 69, s. 3, and therefore were not entitled to more than one vote at vestry meetings, although rated upon more than 50*l*. *Nightingale v. Marshall and Another*, M. 4 G. 4. 313
2. The plaintiff's goods were distrained for poor rates, and upon the sale produced 4*l*. 7*s*. more than was necessary to satisfy the levy. The defendants tendered to him 3*l*. 14*s*. which he refused to accept, saying that it was too late, but did not then or at any other time demand a settlement of the account and the payment of the overplus: *Held*, that the 27 G. 2, c. 20, prevented the plaintiff from recovering without making a demand before the commencement of the action, and that the tender did not make such demand unnecessary. *Simpson v. Routh and Others*, E. 5 G. 4. 682
3. A poor rate must show upon the face of it in respect of what property the assessment is made upon each individual charged by the rate. *The King v. The Undertakers of the Aire and Calder Navigation*, E. 5 G. 4. 713

PRACTICE.

1. The court will not compel a defendant to verify his plea. *Merington v. Becket, Gent., one, &c.*, T. 4 G. 4. 81
2. Where a laetit has by mistake been served upon a wrong person, the right person may afterwards be served with an alias issued upon it. — *v. Johnson*, T. 4 G. 4. 95
3. The panel of tales having been quashed in a special jury case, on the ground of unindifference in the sheriff: *Held*, that a venire facias was properly awarded to the coroner, although two of the special jurymen appeared and were sworn on the former occasion. Upon an award of tales at nisi prius, it is not necessary that the tales should be selected out of persons accidentally present; they may be selected out of persons whose presence the sheriff or coroner has taken previous means to obtain. *The King v. Dolby*, T. 4 G. 4. 104
4. Where a warrant of attorney contained a stipulation that execution might issue upon the judgment, after a year and a day without revivor by scire facias; *held*, that the parties might lawfully make such a bargain, and that the execution was good. An application was made to set aside the inquiry taken on an elegit, because it appeared that all the defendant's lands were extended: *Held*, that the inquiry was altogether void, and that the application to set it aside being unnecessary, the rule for that purpose must be discharged. *Morris v. Jones*, T. 4 G. 4. 232
5. The Court of Admiralty have, in a cause of possession, jurisdiction, to take a vessel from a mere wrongdoer, and to deliver it to the rightful owner; and, therefore, where it appeared upon a rule nisi for a prohibition to restrain the Admiralty Court from proceeding in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it appeared that he was the registered owner, and that the vessel had wrongfully come into the possession of the defendants, and the latter had not pleaded any title, the court discharged the rule for a prohibition. *In the Matter of Blanchard, Baxter, and Others*, T. 4 G. 4. 244
6. Where a prisoner is charged in execution, it is not sufficient for the plaintiff's attorney to file the committitur piece in due time with the clerk of the dockets; he must also see that the latter enters it on the judgment-roll within the time prescribed by R., E. T. 41 G. 3; and if that be not done, the prisoner is entitled to be discharged. *Purdom v. Brockridge*, M. 4 G. 4. 342
7. Prisoners confirmed in the Marshalsea, detected in playing at hazard, punished by the Court. *King's Bench Prison*, M. 4 G. 4. 344
8. The third proclamation required by the 31 Eliz. c. 3, must be made one month at the least before the quinto exactus. If it be not so made, the court will reverse the outlawry. *Quere*, Whether such reversal is for want of proclamations within the meaning of the 31 Eliz. c. 3. or for irregularity. *Taylor v. Waters*, M. 4 G. 4. 353
9. After trial the court will not relieve the tenant by staying proceedings in the ejectment upon payment of the arrears of rent and costs. *Doe dem. Harris v. Masters*, M. 4 G. 4. 490
10. Where in debt on simple contract, the defendant waged his law, the court refused to assign the number of compurgators with whom he should come to perfect his law. *King v. Williams*, H. 4 & 5 G. 4. 538
11. Judgment cannot be entered up on a warrant of attorney more than twenty years old, without an affidavit stating facts which rebut the presumption of payment. *Hulke v. Pickering*, H. 4 & 5 G. 4. 555
12. In assumpsit on a promissory note, defendant pleaded non-assumpsit, and having made up the issue, ruled plaintiff to enter it, who, by a mistake, entered a plea of not guilty. Defendant signed judgment of non. pros.: *Held*, that the plea entered was substantially the same as the other, and the judgment was set aside. *Aaron v. Chaundy*, H. 4 & 5 G. 4. 562
13. The true place of abode of the deponent, as well as his addition, must be inserted in an affidavit to hold to bail. *Collins v. Goodyer*, H. 4 & 5 G. 4. 563
14. Where the plaintiff was discharged under the insolvent act, after issue joined, and before notice of trial given, the court stayed the proceedings until the assignee, or some creditor of the plaintiff, should give security

- for costs. *Heaford v. Knight*, H. 4 & 5 G. 4. 579
15. A certificate that a trespass was wilful to entitle plaintiff to his full costs under the 8 & 9 W. 3, c. 11, s. 4, need not be granted immediately after the trial of the cause. *Woolley v. Whiby*, H. 4 & 5 G. 4. 580
16. Where the defendants, in an indictment for misdemeanor, submitted to a verdict of guilty, upon an understanding that they were not to be brought up for judgment: *Held*, that the prosecutor was not entitled to costs, no agreement having been expressly made respecting them. *The King v. Rawson and Others*, H. 4 & 5 G. 4. 593
17. The court will not, upon motion, quash a bad plea in abatement. *The King v. Cooke*, H. 4 & 5 G. 4. 618
18. A rule for setting aside an inquisition before the sheriff for excessive damages. The matter was referred, nothing being said about the costs of the application. The arbitrator by his award having reduced the damages, it was held, that the plaintiff was not entitled to the costs of the application. *Lewis v. Harris*, H. 4 & 5 G. 4. 620
19. A judge's certificate, under stat. 22 & 23 Car. 2, c. 9, may be granted within a reasonable time after the trial. *Johnson v. Stanton*, H. 4 & 5 G. 4. 621
20. Semble, that the court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud and perjury. *Doe dem. Rees v. Thomas*, H. 4 & 5 G. 4. 622
21. In an action by original, if the defendant does not appear, the bail-bond is forfeited on the quarto die post, the other four days being allowed merely *ex gratia*; and therefore where a commission of bankruptcy issued against one of the bail to the sheriff after the quarto die post, but within four days, it was held that the penalty of the bond was a debt provable under the commission, and therefore barred by the certificate. *Coulson, Assignee of the Sheriff of Middlesex, v. Hammon*, H. 4 & 5 G. 4. 626
22. By the statute 43 G. 3, c. 46, costs are to be allowed to a defendant arrested without probable cause: *Held*, that the statute does not extend to cases where the defendant pays money into court, and the plaintiff takes it out, although it be a much smaller sum than that for which the defendant is holden to bail. *Davey v. Renton*, E. 5 G. 4. 711
23. Where a defendant on being served with a copy of a writ, demands to see the original, and it is not shown to him, the service is irregular, and will be set aside with costs. *Thomas v. Pearce*, E. 5 G. 4. 761
24. The plaintiff, in an action of trespass having obtained a verdict, signed final judgment after the defendant had committed an act of bankruptcy, but before the issuing of a commission: *Held*, that the debt was provable under a commission subsequently issued, and that the defendant, who had been arrested on a ca. sa., was entitled to be discharged on obtaining his certificate. *Robinson v. Vale*, E. 5 G. 4. 762
25. A declaration was delivered before the assign day of Easter term with a rule to plead within the first four days of that term: *Held*, that the defendant had all the morning of the fifth day to plead, and that a judgment signed on that morning was irregular. *Duncan v. Carlton*, E. 5 G. 4. 798
26. A bill in equity was dismissed with costs. The plaintiff brought an action for the same cause, and recovered a verdict. The costs in equity may be set off against the judgment, subject to the lien of the attorney. *Harrison v. Bainbridge*, E. 5 G. 4. 800
27. A party after receiving the costs of a reference and award, which by the terms of a rule of reference were to be paid by the other party, cannot move to set aside the award. *Kennard v. Harris*, E. 5 G. 4. 801
28. Where in an inferior court, the damages in the declaration are laid at 10*l.* and upwards, the defendant may remove the cause without entering into a recognisance to pay the debt and costs according to the 19 G. 3, c. 70, s. 6. *Atterborough v. Hardy*, E. 5 G. 4. 802
29. A demand of a plea is necessary before signing judgment, except where defendant is in custody of the sheriff, and plaintiff has declared against him as being in that custody. *Remington v. Johnson*, E. 5 G. 4. 803
30. A rule to discharge a defendant in execution for a debt not exceeding 20*l.*, he having lain in prison more than twelve months, is absolute in the first instance, notice of the application having been served on the plaintiff. *Davies v. Rogers*, E. 5 G. 4. 804
31. The court will not allow a plea in abatement to an indictment for a misdemeanor to be amended. *The King v. Cooke*, E. 5 G. 4. 871

PRINCIPAL AND AGENT.

The attorney to a commission of bankrupt applied to the attorney of a mortgagee of premises belonging to the bankrupt to join in the sale of the mortgaged premises. The mortgagee having consented, her attorney requested the bankrupt's attorney to prepare, on the part of the mortgagee, requisitions to the commissioners of bankrupt, to ascertain the amount of principal and interest due upon the mortgage, &c. The latter did so. The sale did not afterwards take effect. In an action brought by the bankrupt's attorney against the mortgagee's attorney for the amount due for the business done, it was held that the question was properly submitted to the jury, whether the credit was given to the defendant; and the jury having found that it was, that the attorney was liable, although at the time when the business was done, it was known to be done for the benefit of the mortgagee. *Scrace, Gent., one, &c., v. Whittington, Gent., one, &c.*, T. 4 G. 4. 11

PRISONER.

See CONVICTION, 4. JUSTICES, 2. PRACTICE, 6, 7.

PROHIBITION.

The Court of Admiralty have in a cause of possession jurisdiction to take a vessel from a mere wrongdoer, and to deliver it to the rightful owner; and therefore where it appeared upon a rule nisi for a prohibition to restrain the Admiralty Court from proceed-

ing in a cause of possession, that the proctor for the defendants had merely asserted them to be owners generally, and the other party had put in an allegation, by which it appeared that he was the registered owner, and that the vessel had wrongfully come into the possession of the defendants, and the latter had not pleaded any title, the court discharged the rule for a prohibition. *In the Matter of Blanchard, Baxter, and Others*, T. 4 G. 4. 244

PROMISSORY NOTE.

1. A. and B. made a joint and several promissory note. A. died, and, ten years after his death, B. paid interest upon the note. In an action brought upon the note against the executors of A., it was held that the payment of interest by B. did not take the case out of the statute of limitations, so as to make A.'s executors liable. *Atkins and Others, Executors, v. Tredgold and Others, Executors*, T. 4 G. 4. 23
2. A promissory note for 40*l.*, payable to bearer generally, and therefore, in law, payable on demand, is within the first class of promissory notes in schedule, part 1, to the 55 G. 3, c. 184, and requires a 5*s.* stamp. *Whitlock v. Underwood*, T. 4 G. 4. 157
3. Assumpsit by the endorsee against the maker of a promissory note, payable to A. B., or his order. Plea, first, non-assumpsit; and secondly, that A. B. became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to endorse the promissory note before the time of endorsement became vested in the assignees, whereby the endorsement by A. B. was void, and created no right in the plaintiffs to sue. Replication to the last plea, that the endorsement was made with the consent of the assignees. Rejoinder taking issue upon that fact. A verdict having been found for the plaintiff on the first issue, and for the defendant on the second, it was held that the plaintiff was entitled to judgment upon the whole record. First, because the defendant who had made the note payable to A. B., or his order, was estopped from saying that A. B. was not competent to make an order. Secondly, because the property acquired by a bankrupt subsequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons. *Drayton and Another v. Dale*, M. 4 G. 4. 293

PROMOTIONS, 535, 677.

PUBLIC HOUSE LICENSE.

See JUSTICES, 3.

RATE.

1. By the Manchester and Salford police act, 32 G. 3, c. 69, rates were to be made upon "tenants or occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coachhouses, brewhouses, and other buildings, gardens or garden-grounds, and other tenements situate within the towns of M. and S. respectively." *Held*, that the owner of certain markets kept in the streets of M., in which various articles were exposed to sale, by persons who paid him for that privilege, but had not any stalls fixed to the ground, was not the occupier of a tenement within the meaning of the act; and therefore was not liable to be rated in respect of the profits of such markets. *The King v. Mosley, Bart.*, T. 4 G. 4. 226
2. By a local act for building a chapel, the trustees therein mentioned were authorized to appoint a treasurer, clerk, and other officers, and out of the money to be received by virtue of the act to pay such salaries to them as they (the trustees) should think reasonable, and out of the same fund they were to pay to the curate a yearly salary not less than 150*l.*: they were authorized to borrow any sum at interest, not exceeding 30,000*l.*; which moneys so borrowed, and the interest thereof, were to be made payable out of the burial-fees, and out of rates and assessments to be made in pursuance of the act. They were also authorized to grant annuities, provided the money so raised by annuities did not exceed the whole sum intended to be raised for the purposes of the act. They were authorized also to make an assessment on the occupiers of houses, lands, &c., within the parish, not exceeding 2*s.* 6*d.* in the pound on the yearly value, and the rates were to be applied by them to the purposes of that act during such time as any of the moneys to be borrowed upon the credit of the act should remain unpaid or the annuity granted should have continuance; and by another clause, the trustees were empowered to take a distress for non-payment of the rates. The trustees appointed under this act raised a sum of 32,636*l.*, partly by annuity and partly by borrowing upon common interest; and made a rate to pay the annuities and the interest upon the whole money borrowed. A distress having issued, the plaintiff replevied, and the defendant avowed as collector of the rates imposed by the act. The plaintiff, after setting out several clauses in the act of parliament, pleaded that before the making of the assessment, the trustees had wrongfully borrowed more than the sum of 30,000*l.* which, by the act, they were authorized to do, viz., 136 by annuities and 2,500*l.* by borrowing, and that the rates were made amongst others, for the purpose of paying the said annuities and money borrowed. Replication, that the burial-fees were insufficient to answer the purposes of the act, and that the annuities granted by the act were in existence, and that it was necessary for the trustees to raise money by assessments, in order to carry into effect the purposes of the act; and that the assessments were duly made pursuant to the act, and without stating that the rates were made for the purpose of paying the annuities and money borrowed, or any other purpose whatever: *Held*, upon demurrer, that the plaintiff was entitled to judgment, inasmuch as the act of parliament only authorized the trustees to borrow a specific sum, and the rate having been made to pay the interest due upon the whole sum borrowed, was bad in toto, although the defect did not appear upon the face of it. *Richter v. Hughes*, M. 4 G. 4. 499
3. By 55 G. 3, an appeal is given against a county rate made in fixed proportions, in-

- variably adopted for a series of years. *The King v. The Justices of York*, E. 5 G. 4. 771
4. By a local act, giving to commissioners certain powers to be exercised for the preservation of the town of B. from the encroachments of the sea: it was enacted, that there should be paid to the commissioners any rate or duty which they should think fit to order, not exceeding the sum of 3s. for every chaldron of coal brought or delivered within the limits of the town: *Held*, that under this act a duty was payable in respect of each quantity of coals amounting to several chaldrons, brought into the town, although at different times, in several parcels, each containing a less quantity than a chaldron. *Mills v. Foxwell*, E. 5 G. 4. 899

RELEASE.

See COVENANT, 1.

REMAINDER.

See DEVISE.

ROAD.

See ENCLOSURE ACT.

SECURITY FOR COSTS.

See PRACTICE, 14.

SELECT VESTRY.

In the parish of W. the poor rates, according to ancient custom, had always been made without respect to the value of the property in the parish, but according to the supposed ability of the party charged; *Held*, that persons so rated, were not rated in respect of any annual rent, profit, or value, within the meaning of the 58 G. 3, c. 69, s. 3, and therefore were not entitled to more than one vote at vestry meetings, although rated upon more than 50l. *Nightingale v. Marshall and Another*, M. 4 G. 4. 313

SETTLEMENT.

1. Upon the trial of an appeal at the quarter sessions, the respondent parish proved relief granted to the father of the pauper by the appellant parish before the year 1815. The appellant parish then tendered an order of sessions made in the year 1815, quashing an order of justices for the removal of the brother of the pauper to the appellant parish. And they tendered parol evidence to show that the ground of the decision of the court of quarter sessions was, that the father of the pauper had not at that time any settlement in the appellant parish, and, consequently, that the son had not any derivative settlement there: *Held*, that even if parol evidence was admissible to prove the ground of the decision of the sessions, still that the order of sessions was not evidence that the father of the pauper was not settled in the appellant parish in 1815, because the father's settlement was a matter that arose collaterally on the trial of the first appeal. *The King v. The Inhabitants of Knaptoft*, E. 5 G. 4. 883
2. An illegitimate child, born in an extra-parochial place, does not follow the settlement of its mother. *The King v. The Inhabitants of St. Nicholas, Leicester*, E. 5 G. 4. 889

SETTLEMENT—By Apprenticeship.

The statute 56 G. 3, c. 139, s. 1, requiring that the order of justices for the binding out of

parish apprentices, shall be referred to in the indenture by the date thereof, is compulsory; and therefore an indenture in which the date of the order is omitted, is void, and no settlement is gained by serving under it. *The King v. The Inhabitants of Bamberg*, T. 4 G. 4. 822

SETTLEMENT—By Estate.

1. A written agreement was made for the purchase of an estate, to be paid for by two instalments; the first was to be payable within a few days after the signing of the agreement, and the last after the expiration of seven months. The vendor was to make out a good title on the payment of the last instalment, and to convey the premises; but the purchaser was to be let into possession upon the payment of the first instalment. The purchaser paid the first instalment, and was let into possession, and continued in possession for a year and a half, but the last instalment was never paid, nor any conveyance ever executed; and the purchaser afterwards gave up the contract upon receiving back part of the first instalment: *Held*, that under this contract, the purchaser did not acquire equitable estate, so as to gain a settlement under the 9 G. 1, c. 7, s. 5. *The King v. The Inhabitants of Geddington*, T. 4 G. 4. 129
2. A widow, before assignment of dower, has not such an interest in the land of which she is dowable, as to be irremovable from the parish in which the land lies. *The King v. The Inhabitants of North Weald Bassett*, E. 5 G. 4. 724

SETTLEMENT—By Hiring and Service.

1. The pauper was hired to serve as a servant in husbandry, from Michaelmas, 1821, to Michaelmas, 1822, at weekly wages; and if he and his master could not agree for the harvest, he was to harvest for himself. Previously to the harvest, the master offered the pauper 5l. for the harvest, which he accepted, and continued in the service the whole year: *Held*, that this was an exceptive, and not a conditional hiring, and that no settlement was gained. *Rex v. Althorne*, T. 4 G. 4. 112
2. A pauper was by indenture hired for a year as a driver in a colliery, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day more when that time was exceeded, and he was to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. per day for lying idle, (to be deducted out of his wages.) There was a proviso, that nothing in the indenture should be construed to oust the jurisdiction of the justices, or to prevent either master or servant from applying to them in case of disputes; and a covenant, that in case the master, about Christmas, should wish to repair any engine, &c., belonging to the colliery, he might stop the workings for any period not exceeding seven days, without paying any wages to the pauper, unless employed in other work: *Held*, that this was a conditional, and not an exceptive contract, and that the pauper gained a settlement by serving under it for the whole year. *Rex v. The Inhabitants of Byker*, T. 4 G. 4. 114
3. An agreement was made between A. and

B., that the latter should serve for three years at 1s. per day, when B. had work to do, and when he had no work, A. was not to be paid. At the time when the agreement was made, the master told the servant that he should not have work for him during the whole year, and particularly during the winter, and that when he had not work for him he might get work from other people: *Held*, that this was an exceptive hiring, and that the pauper having worked for other people during the winter season when his master had no work, and having at other times worked for his master, during two successive years, did not gain a settlement. *The King v. The Inhabitants of Polesworth*, E. 5 G. 4. 715

4. Where a master, who had hired a servant for a year, at the expiration of eleven months made a complaint against him before a justice of peace, and the latter, under the provisions of the 20 G. 2, c. 19, s. 2, committed the servant to the house of correction for one calendar month, which did not expire until after the end of the year for which he had been hired: *Held*, that this was an abiding in the master's service for a whole year, within the meaning of the 8 & 9 W. 3, c. 30, and that the servant thereby gained a settlement. *The King v. The Inhabitants of Hallow*, E. 5 G. 4. 739

5. The father of a pauper aged fourteen years, agreed by parol to give a shoemaker a guinea for teaching his trade to the pauper for twelve months. The son served the twelve months under that agreement. At the end of that period, the father agreed that his son should work for the shoemaker for twelve months, making shoes at 3d. per pair the first six months, and 4d. per pair the last six months; under this latter agreement the pauper served six months only: *Held*, that this latter service could not be connected with the service of the former year so as to give a settlement, inasmuch as the first agreement created the relation of teacher and scholar, and not that of master and servant, and the whole year's service, required to confer a settlement, must be under a contract or contracts creating the relation of master and servant. *The King v. The Inhabitants of Saint Mary Kidwelly*, E. 5 G. 4. 750

6. A pauper had been hired three years at 20l. per annum as a looker. The duty of looker is to superintend the flocks and fences of his employer. When he was hired, his master told him that he should not have full employment for him, but that he would employ him as much as he could. He was not to do any work for his master other than that belonging to the office of looker, without receiving extra wages. During the first year and three-quarters he worked for his master only, but was always paid extra for any work not belonging to his office of looker: *Held*, that there was not any hiring for a year, and that the pauper did not gain a settlement by service under such a hiring. *The King v. The Inhabitants of Lydd*, E. 5 G. 4. 754

* A pauper was hired to serve for part of a year. Three weeks before the expiration of the period of service, the mistress asked the pauper to stay again. The pauper replied

that she had no objection if they could agree about wages. They did agree for 3l. 10s., and 1s. earnest was paid; nothing was then said as to the time for which the pauper was to serve, but a week afterwards the mistress said to the pauper, "I have hired you, but mentioned no time; remember, that you are hired for fifty-one weeks," to which the pauper assented: *Held*, that this was a good hiring for a year. *The King v. The Inhabitants of Market Bosworth*, E. 5 G. 4. 757

8. Where a pauper served under a yearly contract in the parish of A., and was afterwards hired in the same parish by the same master for a less period than a year, (there being no interruption of the service,) and during the latter period removed with his master into the parish of B., and served him there: *Held*, that the pauper acquired no settlement in that parish, inasmuch as no part of his service there was under a yearly hiring. *The King v. The Inhabitants of Apeltorp*, E. 5 G. 4. 892

SETTLEMENT—By Payment of Rates.

A settlement may be gained by being rated and paying parochial taxes in respect of a tenement, being above the value of 10l. *Res v. The Inhabitants of St. Pancras, Middlesex*, T. 4 G. 4. 123

SETTLEMENT—By renting a Tenement.

1. The pauper was hired for a year as a shepherd: he was to have a house and garden rent free, 7s. a week, and the going of thirty sheep with his master's flock, as wages. He served for two years at those wages in the parish of I., during all which time the sheep went on his master's farm, the whole of which was situated in that parish. The feed of the sheep was worth 16l. per annum: *Held*, that this did not confer a settlement, it not being any part of the bargain that the sheep should be pasture fed.

Semble, That in order to gain a settlement by renting a tenement, the pauper must reside upon some part of it. *The King v. The Inhabitants of Bardwell*, T. 4 G. 4. 161

2. A pauper was hired for a year, and had by agreement a house and garden, a rood of potato land, and the keep of a cow on his master's land. After the pauper had served ten years, his cow failing in milk, the pauper had in lieu of the cow two heifers kept for him through the kindness of his master, and not in consequence of any bargain. The potato land and the keep of two heifers was of the annual value of 10l., but the potato land and the keep of the one cow was of less annual value than 10l.: *Held*, that the pauper, by having the potato land and the keep of the two heifers, before the passing of the stat. 59 G. 3, c. 50, gained a settlement: but, semble, that by having the potato land and the keep of the two heifers after the passing of the 59 G. 3, c. 50, he would not have gained a settlement. *The King v. The Inhabitants of Bennsworth*, E. 5 G. 3. 775

3. A. hired a house for 10l. a year, and put into it his furniture worth above 15l., and lived in it above a year. Having applied for relief, the parish officers were compelled by a magistrate's order to grant it. After the relief was granted, the landlord demanded

his rent, but allowed A. a fortnight's time to pay it. Before that time expired, and before the rent was paid, the pauper was removed to another parish by an order of two justices. After he had been removed, he sold his furniture and paid the year's rent: *Held*, first, that the parish officers having been compelled to grant relief, A. had thereby become actually chargeable, and was therefore removable by statute 35 G. 3, c. 101, although he had resided above forty days on the tenement.

Held, secondly, that at the time when the order of removal was made, he had not gained any settlement in the removing parish, because he had not then paid a year's rent as required by the 59 G. 3, c. 50. *The King v. The Inhabitants of Amptill*, E. 5 G. 4. 847

SHAM PLEAS.

See PLEADING, 5.

SHIP.

1. The 43 G. 3, c. 56, s. 2, prohibits the conveying in any ship from any place in the United Kingdom, a greater number of persons than in the proportion of one person for every two tons of the burden of the ship, and every such ship is to be deemed to be of the burden described in the certificate of registry; and if any ship is partly laden with goods, the master is prohibited from taking on board a greater number of persons than in the proportion of one person for every two tons of that part of the ship remaining unladen: *Held*, under this act, that vessels partly laden with goods were to be deemed of the burden described in the certificate of registry. *Bishop and Another v. Macintosh and Another*, H. 4 & 5 G. 4. 556
2. Defendants' testator being sole owner of a ship, signed and delivered to the plaintiff, G. J. K., an instrument, describing the ship as copper bolted, (but not reciting the certificate of registry); at the foot of which was written, "Sold the within mentioned ship to G. J. K." He afterwards executed a bill of sale to the plaintiff in the usual form, which did not describe the ship as copper bolted. She was not copper bolted, and plaintiff declared in assumpsit against the defendants (as executors of the vendor) for the breach of his warranty in that particular: *Held*, that the action could not be maintained, the instrument first mentioned being void by the 34 G. 3, c. 68, s. 14. *Kain v. Old and Others, Executors*, H. 4 & 5 G. 4. 627
3. A. and B. (being owners of nine-sixteenths shares of a ship, and also husbands or managing owners) by deed sold five-sixteenths to C. The deed contained a covenant that C. should be appointed to the command of the ship, and that A. and B. should continue to have the management, as husbands, and should elect the tradesmen and appoint all the officers; and that if C. should relinquish the command, or die, A. and B. should appoint such fit person to succeed him as might be approved of by him or his executors, or that he or they might nominate a fit person to the command in his stead, and that A. and B. should be employed as the agent of C. in the concerns of the ship; and if C. should be minded to sell all or any of his shares he might do so, upon condition that

the purchasers should abide by the stipulations in the deed, and not remove A. and B., or the survivor of them, from being managing owners, so long as they should perform the stipulations on their part: *Held*, that although the covenant to continue A. and B., as C.'s agents in the concerns of the ship, might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares, with a stipulation for the appointment to the command, and the continuance of the management, it was illegal and void. *Card and Cannon v. Hope*, H. 4 & 5 G. 4. 661

SHIP OWNER.

See AVERAGE, 1.

SIMONY.

Where a contract was made for the sale of a next presentation, the parties at the time knowing the incumbent to be at the point of death, expecting an immediate vacancy: *Held*, that the contract was simoniacal, and the presentation made in pursuance of it by the purchaser void, although the clerk presented was not privy to the transaction, and the contract was not entered into with a view to the presentation of any particular person. *Fox v. the Bishop of Chester*, H. 4 & 5 G. 4. 635

SLANDER.

See PLEADING, 18.

SLAVE TRADE.

Where certain persons who had been slaves in a foreign country, where slavery was tolerated by law, escaped thence, and got on board a British ship of war, on the high seas: *Held*, that a British subject resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship for harbouring the slaves after notice. *Forbes v. Cochran and Another*, M. 4 G. 4. 449

STAGE COACHES.

See TOLL, 1.

STAMP.

1. A bill was in fact drawn on the 21st day of December for 21l. payable two months after date; but on the face of it purported to bear date on the 31st: it was held to require only a stamp of 2s., which is imposed by 55 G. 3, c. 184, on bills for that sum, not exceeding two months after date. The word "date," as there used, meaning the period of payment expressed on the face of the bill. *Upstone and Another v. Marchant*, T. 4 G. 4. 10
2. A promissory note for 40l., payable to bearer generally, and therefore, in law, payable on demand, is within the first class of promissory notes in schedule, part 1, to the 55 G. 3, c. 184, and requires a 5s. stamp. *Whitlock v. Underwood*, T. 4 G. 4. 157
3. An assignment by indenture of a judgment-debt is not an assignment of property within the meaning of the 55 G. 3, c. 184, sch. part. 1, tit. Conveyance, and does not therefore require an ad valorem stamp; but must have the ordinary deed-stamp. *Warren v. Howe*, M. 4 G. 4. 281
4. A. having consigned goods to B., sent him

the following order: "Pay to A. B. the proceeds of a shipment of goods, value about 2000^l., consigned by me to you." C., by writing, consented to pay over the full amount of the net proceeds of the goods: *Held*, that neither of these instruments required such a stamp as the stamp acts imposed on bills, drafts, or orders for the payment of money. *Jones and Another v. Simpson and Others*, M. 4 G. 4. 318

STOCK-JOBING.

See EVIDENCE, 14.

STOPPAGE IN TRANSIT.

See VENDOR AND VENDEE, 5.

TENEMENT.

See RATE.

TOLL.

By a turnpike act, a toll of 4^d. was imposed upon every horse or other beast drawing any coach or other carriage; for every horse drawing singly any carriage, the same toll; for every horse drawing any wagon or other such carriage drawn by two horses more, the sum of 3^d.; for every horse laden or unladen, and not drawing, the sum of 1^d. The statute then provided that no person should be liable to pay toll more than once in any one day at any toll-gate for passing and re-passing in any one day with the same horses and carriages through the same, but all persons having paid toll once, and producing a ticket denoting the payment of such toll, were afterwards to pass and re-pass with the same horses and carriages toll free during the same day. A stage coach, drawn by four horses, passed through a gate erected under this act of parliament, and paid the toll. In the evening of the same day, a different coach, called by the same name, belonging to the same proprietor, driven by the same coachman, and drawn by the same four horses, but carrying different passengers and different parcels for hire, passed through the same gate: *Held*, that a second toll was payable in respect of this carriage and horses. *Loaring v. Stone*, M. 4 G. 4. 515

TRANSFER NOTE.

See VENDOR AND VENDEE, 5.

TREAD MILL.

See JUSTICES, 2.

TRESPASS.

1. Trespass for breaking and entering the plaintiff's manor. Pleas, first, general issue; second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public navigable river from time immemorial, and that there is in that part of the port which is within the manor, an ancient work necessary for the preservation of the port, and for the safety and convenience of the ships resorting to it: that this work was, at the several times when, &c., in decay; that plaintiff would not repair it, but neglected so to do, wherefore defendants entered and repaired. Replication, *de injuriâ*. Verdict for plaintiff on the first plea, and for defendants on the second: *Held*, that plaintiff was entitled to judgment *non obstante veredicto*, as the second plea did not state that immediate repairs were

necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port. *Quære*, Whether the plea would have been good had it contained those allegations. *The Earl of Lonsdale v. Nelson and others*, M. 4 G. 4. 302

2. Where the parish clerk refused to read in church a notice which was presented to him for that purpose, and the person presenting it read it himself, at a time when no part of the church service was actually going on: *Held*, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards in order to take him before a magistrate. *Williams v. Glenister*, E. 5 G. 4. 699

TROVER.

1. The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house: *Held*, that they passed by the conveyance of the freehold; and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them. A few articles, which were not fixtures, were also left in the house; the demand described them together with the other articles, as fixtures, and the refusal was of the fixtures demanded: *Held*, that upon this evidence the plaintiff could not recover them in this action. *Colegrave v. Dias Santos*, T. 4 G. 4. 76
2. Where A. bought goods of a trader who had previously committed an act of bankruptcy, and paid for them *bonâ fide* without knowledge of the bankruptcy: *Held*, that the assignees, under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 Jac. 1. c. 15. s. 14. *Cash and Another, Assignees, v. Young*, M. 4 G. 4. 413
3. A customer was in the habit of endorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid; and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson and Others v. Giles and Others, Assignees*, M. 4 G. 4. 422
4. A. by contract sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt.; and on the same day gave a written order upon the wharfingers to weigh, deli-

ver, transfer, and re-house the same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers and gave to C. a written acknowledgment that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order: *Held*, in an action of trover by C. against the wharfingers, that, after their acknowledgment, they held the tallow as the agents of C., and that they could not therefore set up as a defence a right in A. to stop in transitu. *Haves and Another v. Watson*, H. 4 & 5 G. 4. 540

TRUSTEES OF TURNPIKE ROADS.

See ACTION on the CASE, 5.

UNDER-LEASE.

See ANNUITY, 3.

VARIANCE.

1. Where a declaration against a sheriff for taking insufficient pledges in a replevin-bond stated that the party replevying levied his plaint "at the next county court, to wit, at the county court holden on, &c., before A., B., C., and D., suitors of the court," which plaint was afterwards removed by re. fa. lo.; and by that record it appeared that the plaint was levied at a court holden before E., F., G., H.: *Held*, that the variance was immaterial, for that it was unnecessary to state or prove the names of the suitors, and that they might be rejected as surplusage. *Draper v. Garratt*, T. 4 G. 4. 2
2. Declaration, that for certain hire and reward defendants undertook to carry goods from London and deliver them safely at Dover. The contract proved was, to carry and deliver safely (fire and robbery excepted): *Held*, that this was a variance. *Latham v. Rutley*, T. 4 G. 4. 20
3. Where in case for slander of title it appeared by the declaration that the plaintiff had a certain interest in the premises, and that by an agreement between himself and the defendant, (from whom he derived that interest,) he had a clear right to dispose of the whole of that interest, but only a doubtful right to dispose of any portion of it, and the plaintiff averred that he put up his said interest to auction, and that the defendant published a libel of and concerning his right to sell the said interest; the evidence being that he offered for sale a portion of that interest only: *Held*, that this was a fatal variance. *Millman v. Pratt*, M. 4 G. 4. 486

VENDOR AND VENDEE.

1. The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house: *Held*, that they passed by the conveyance of the freehold; and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them. A few articles which were not fixtures were also left in the house; the demand described them together with the other articles, as fixtures, and the refusal was of the fixtures demanded: *Held*,

that upon this evidence the plaintiff could not recover them in this action. *Colegrave v. Dias Santos*, T. 4 G. 4. 76

2. A. being seized in fee of the manor of F. and the demesne lands thereof, and of all the coal mines lying under the manor, enfeoffed C. D. of and in certain closes, except and always reserved to the feoffor, his heirs, and assigns, all tithes of corn and grain, and also except and always reserved out of the said feoffment unto the feoffor and his heirs, all the coals in all or any of the said lands and premises, together with free liberty for them, the said feoffor and his heirs, and his and their assigns and servants, at all times thereafter, during the time that he, the feoffor, and his heirs, should continue owners and proprietors of the demesne lands of F., to sink and dig pits, or otherwise to sough and get coals in all and every the lands and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their free will and pleasure, he, the said feoffor, and his heirs, paying to the feoffee, his heirs and assigns, such satisfaction for the damages as two neighbours, indifferently chosen by the feoffee and feoffor, their heirs and assigns, should from time to time award.

The heirs of the feoffor having, for a valuable consideration, conveyed to a purchaser in fee the manor of F. and its demesne lands, with its appurtenances, and all the coal mines under (amongst others) the lands in question, &c., it was held that the coals were, by the exception, reserved to the feoffor in fee, and therefore that they passed to the purchaser: *Held*, also, that the latter was entitled, under the express liberty reserved, to enter upon the land, to dig pits, and get the coals, so long as he remained owner of the demesne lands.

Semble, That the express liberty is not restrictive of that which would be implied by law to get the coals, and that the purchaser would be entitled to an incidental right to get them co-extensive with his estate. *The Earl of Cardigan v. Armitage*, T. 4 G. 4. 197

3. Where A. bought goods of a trader who had previously committed an act of bankruptcy, and paid for them bona fide without knowledge of the bankruptcy: *Held*, that the assignees under a commission issued against the seller, could not maintain trover for the goods, the payment being protected by the 1 J. 1, c. 15, s. 14. *Cash and Another, Assignees, v. Young*, M. 4 G. 4. 413
4. By the conditions of a sale by auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid: *Held*, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other. *Phillips v. Bistolfi*, M. 4 G. 4. 511

5. A. by contract sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt.; and on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, and re-house the same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers and gave to C. a written acknowledgment that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order: *Held*, in an action of trover by C. against the wharfingers, that, after their acknowledgment, they held the tallow as the agents of C., and that they could not therefore set up as a defence a right in A. to stop it in transitu. *Hawes and Another v. Watson and Another*, H. 4 & 5 G. 4. 540
6. In assumpsit for not delivering goods upon a given day, the true measure of damages is the difference between the contract price and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered. *Gainsford v. Carroll and Others*, H. 4 & 5 G. 4. 624
7. Defendant's testator being sole owner of a ship, signed and delivered to the plaintiff G. J. K. an instrument describing the ship as copper bolted, (but not reciting the certificate of registry;) at the foot of which was written, "Sold the within-mentioned ship to G. J. K." He afterwards executed a bill of sale to the plaintiff in the usual form, which did not describe the ship as copper bolted. She was not copper bolted, and plaintiff declared in assumpsit against the defendants, (as executors of the vendor,) for the breach of his warranty in that particular. *Held*, that the action could not be maintained, the instrument first mentioned being void by the 34 G. 3, c. 68, s. 14. *Kain v. Old and Others, Executors*, H. 4 & 5 G. 4. 627
8. A. and B. (being owners of nine-sixteenth shares of a ship, and also husbands or managing owners) by deed sold five-sixteenths to C. The deed contained a covenant that C. should be appointed to the command of the ship, and that A. and B. should continue to have the management, as husbands, and

should elect the tradesmen and appoint all the officers; and that if C. should relinquish the command, or die, A. and B. should appoint such fit person to succeed him as might be approved of by him or his executors, or that he or they might nominate a fit person to the command in his stead, and that A. and B. should be employed as the agent of C. in the concerns of the ship; and if C. should be minded to sell all or any of his shares, he might do so, upon condition that the purchasers should abide by the stipulations in the deed, and not remove A. and B., or the survivor of them, from being managing owners, so long as they should perform the stipulations on their part: *Held*, that although the covenant to continue A. and B., as C.'s agents in the concerns of the ship, might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares, with a stipulation for the appointment to the command, and the continuance of the management, it was illegal and void. *Card and Cannon v. Hope*, H. 4 & 5 G. 4. 661

9. At a sale of goods by auction, certain conditions of sale were read before the biddings commenced, but were not attached to the catalogue. An agent for the defendant was the highest bidder for a lot, and the auctioneer put down the price 105*l.*, and the agent's name opposite that lot in his catalogue: *Held*, that sales of goods by auction are within the 29 Car. 2, c. 3, s. 17, and that no sufficient memorandum of the bargain was signed to satisfy that section, the conditions of sale not being annexed to the catalogue. Had they been annexed, it would have sufficed to put down the agent's name, that of his principal not being necessary. *Keworthy v. Schofield*, E. 5 G. 4. 945

WAGER OF LAW.

See PRACTICE, 10.

WARRANTY.

See SHIP, 2.

WARRANT OF ATTORNEY.

See PRACTICE, 11.

WITNESS.

See EVIDENCE, 14.

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY
PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW.

VOLUME II.
FROM EASTER TERM, 5 GEO. IV. 1824, TO HILARY TERM, 6 GEO IV. 1825,
BOTH INCLUSIVE.

PHILADELPHIA,
T. & J. W. JOHNSON, LAW BOOKSELLERS.
.....
1845.

JUDGES
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD CONTAINED IN THIS VOLUME.

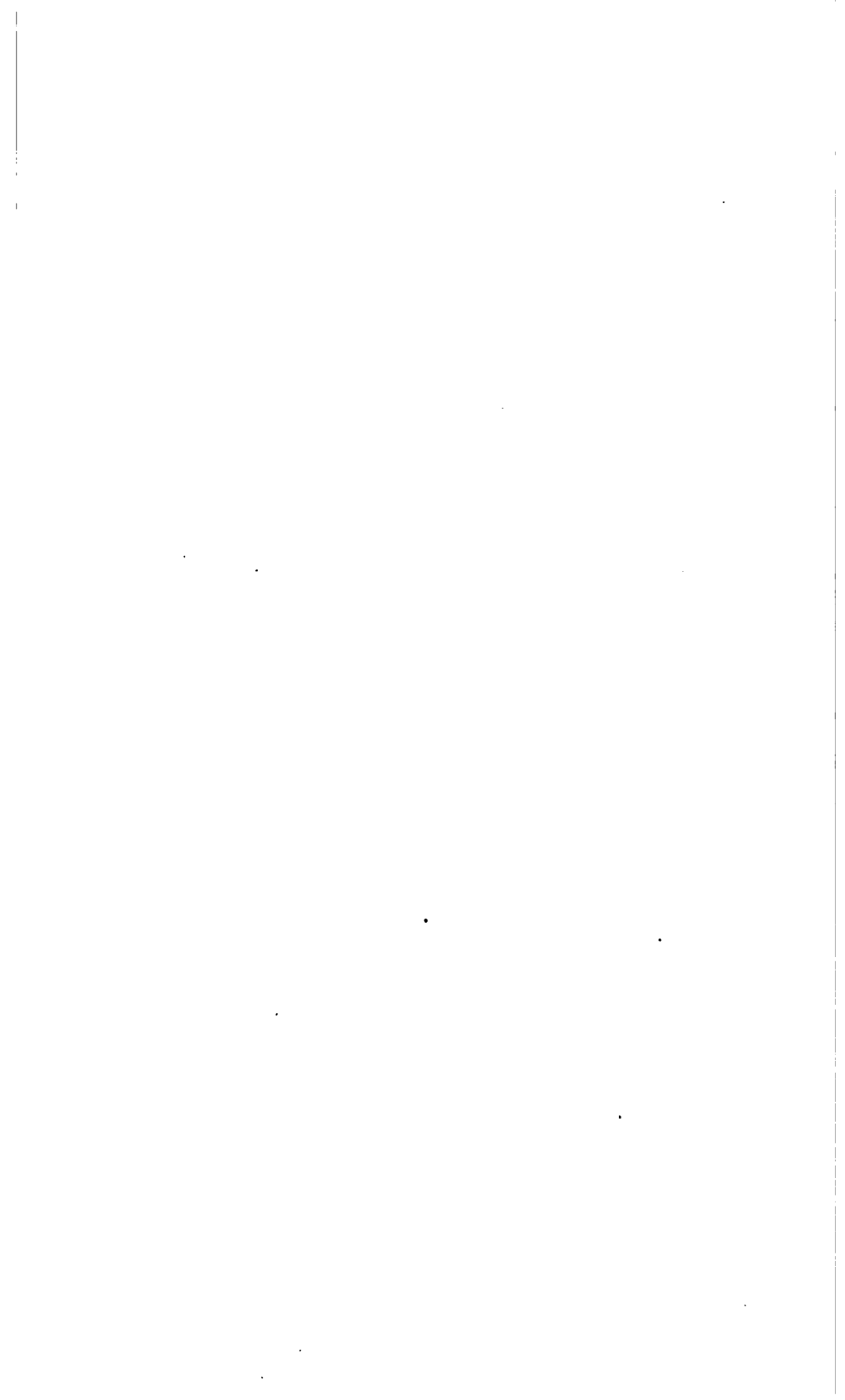
The Right Hon. Sir WILLIAM DRAPER BEST, Knt.,
Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir JOHN RICHARDSON, Knt.

Hon. Sir STEPHEN GASELEE, Knt.



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IN THE FIFTH YEAR OF THE REIGN OF GEORGE IV.

Lord GIFFORD having been appointed Master of the Rolls, Sir WILLIAM DRAFER BEST, Knight, one of the Judges of the Court of King's Bench, took his seat as Chief Justice of this Court on the first day of this term.

On the 13th of May, *William St. Julien Arabin* and *Thomas Wilde*, of the Inner Temple, Esquires, were called to the degree of the coif, and gave rings, with the following motto: "*Regi regnoque fidelis.*"

A statement in a deposition before the commissioners of bankrupts, that a party promised to meet one of his creditors at a given place, and failed to do so, is not sufficient evidence to establish an act of bankruptcy under 49 G. 3, c. 121, s. 10.

THIS was an action by the plaintiffs, as assignees of B. Tucker, a bankrupt. At the trial, before BOSANQUET, Serjt., at the last Somerset Spring assizes, the defendant not having given notice of any intention to dispute the act of bankruptcy, the plaintiffs proceeded, under the 49 G. 3, c. 121, s. 10, to establish it, by putting in the depositions taken before the commissioners. The deposition stated, that J. Brown, the deponent, called at the house of B. Tucker, who then and there promised to meet deponent next day, at the office of B. and O. Smith, the solicitors for deponent's employers, in relation to his giving security for a debt then owing by him to deponent's employers, over due. And deponent further stated, that he and his employers attended accordingly at Messrs. Smith's office at the time appointed, and waited there a considerable time, but B. Tucker did not attend the appointment, but altogether absented himself from the said place of appointment.

No other proof being offered, the learned serjeant directed a nonsuit, on the ground that the deposition did not contain any statement of the bankrupt's having absented himself with a view to delay creditors.

Taddy, Serjt., now moved for a rule nisi to set aside this verdict and have a new trial, contending that there was a sufficient *prima facie* statement of the bankrupt's having absented himself with intent to delay his creditors: it being immaterial for this purpose whether he absented himself from his dwelling-house, or from a *place at which he had appointed to meet his creditors. [*3 In *Gimingham v. Laing*, 2 Marsh. 236, the chief justice said, the bankrupt "had several creditors, at the sight of whom he frequently left his occupation on the exchange, desiring his friend to say that he was not there; and on one occasion he broke an appointment which he had made with a creditor to meet him there. There cannot be stronger evidence of a man absenting himself from his creditors."

BEST, C. J. If there were any evidence that the party absented himself from the place appointed, with a view to delay his creditors, the direction of the learned serjeant was wrong; but there is no evidence of that sort, and all that the deposition states is a mere breach of appointment: such a statement does not present even a *prima facie* case of an act of bankruptcy, nor any thing from which it can be presumed that the party was absent from the place appointed with any intention to delay his creditors. Nor is there any thing in this case to impugn that which has been cited. There, the proprietor of a theatre retired behind the scenes to avoid a sheriff's officer, at the same time giving orders to be denied to him. In another instance, the circumstance of a party's having crossed the street(a) was holden a sufficient absenting himself; but there was also clear evidence of an intention to delay creditors. It is not fit, however, that men should be entrapped into acts of bankruptcy; and we should extend our decisions beyond the policy of the bankrupt laws, if we were to hold a mere breach of engagement as *prima facie* evidence of an act of bankruptcy.

PARK, J. In order to support an action by assignees, the depositions before the commissioners, when adduced *as evidence of an act of bankruptcy, [*4 ought to contain, on the face of them, what, if unanswered, would amount to a clear act of bankruptcy; but no one can say that this deposition contains any statement to such an effect; all that is alleged amounts only to an omission to observe an engagement, and nothing is said of any intention to delay creditors.

BURROUGH, J. *Gimingham v. Laing* was a case very different from the present. There the party, who was the proprietor of a theatre, retired behind the scenes to avoid a creditor, but here there is no evidence whatever of any such intention.

Rule refused.

(a) *Chenoweth v. Hay*, 1 M. & S. 676.

HARRISON v. ALLEN and Others, Executors of W. YOUNGHUSBAND.

The defendant, who had contracted for jewellery, was to return it in a twelvemonth, and if he omitted to do so, to pay for it a certain price, *with interest*.

The plaintiff sued for the amount, the jewellery having been retained; but the only counts in the declaration applicable to his case were a count for goods sold and delivered, and a count for interest on money due and forborne.

The jury having found a verdict for the sum demanded, with interest, the court refused to set aside the verdict, or to reduce the damages.

THE plaintiff sued in *assumpsit* on a contract, under which the testator had purchased of him a quantity of jewellery, on the following terms; viz., to return the jewellery within a twelvemonth, and if he omitted to do so, to pay for it a certain price, *with interest*. The first count of the declaration stated the contract, without any mention of the interest; and at the trial before PARK, J., Guildhal sittings after last term, the plaintiff failed to establish his demand,

according to the statement in that count; but as there was a count for goods *5 sold and *delivered, and a count for interest on money due and forborne, *6 together with the usual money counts, the jury found a verdict for the plaintiff, 198*l.*, and interest from March, 1819, 50*l.*

Taddy, Serjt., now moved for a rule nisi to set aside this verdict and enter a nonsuit, or to reduce the damages.

The plaintiff, having failed to substantiate his special count, cannot recover on the two common counts, because the whole was one contract, and ought to have been aptly described in a single count: he cannot recover for part of the contract, namely, the goods sold, in one count, and for the residue of it, namely, the interest, in another. [BURROUGH, J., referred to *Slack v. Lowell*, 3 Taunt. 157, where, upon a contract for the sale of goods, to be paid for by a bill at a certain date, it was holden, the price might bear interest from the day when the bill would have been due, and that the interest might be recovered as damages on a special count, for the non-delivery or non-payment of the bill; but that if, in such a case, upon a general count for goods sold and delivered, the jury should give the price and interest as damages, the court would not, therefore, set aside the verdict.] At all events, the defendant is entitled to have the damages reduced, by the amount of the interest found by the jury, as the payment of interest is nowhere in the declaration alleged to have formed part of the contract for the purchase of the goods: *Gordon v. Swan*, 12 East, 419.

BEST, C. J. It is impossible for the court to grant a new trial in this case. The verdict is right for the principal sum; and if the ground of application had *6 been that the plaintiff had received something which *the defendant ought not to pay, the court might have thought it right to grant the rule: but it is not so, for, by the express agreement between the parties, the plaintiff is entitled to interest, and that distinguishes the present case from *Gordon v. Swan*, in which there was no stipulation for interest. The defendant purchases jewellery, which he is to return within a twelvemonth, or to pay for at a certain price, with interest; the goods are not returned, and the interest becomes payable. It has been urged, indeed, that there is no count expressly adapted to the plaintiff's case; but where we see the plaintiff is so clearly entitled, shall we do the defendant himself such injustice as to grant this rule, the effect of which will be to deduct 50*l.* from the payment he is called on now to make, but to compel him ultimately to pay it in a new action. In motions for new trial, the court may fairly endeavour to do that which advances the justice of the cause, and by refusing this rule we only save the defendant from paying, with the tremendous interest of accumulated costs, what he is, in justice, bound to pay at once.

PARK, J. The defendant is clearly liable to pay; and justice having been done, the court ought to refuse the rule.

BURROUGH, J. We see clearly that justice has been done; and when that is the case, we ought not to set aside the verdict.

Rule refused.

*7]

*GIBSON v. MINET and Others.(a)

The plaintiff gave the following order on the defendants, his bankers: "I request you to hold me 400*l.* from my private account, to the disposal of J. Mintern and Co."

The order was presented to the bankers, who had also an account with Mintern & Co.; but Mintern & Co. not requiring the money, it was not paid to them, or passed to their account. The plaintiff revoked the order before it was paid, or carried to Mintern's account; notwithstanding which revocation, the defendants afterwards paid the money to Mintern & Co.

A jury having found for the plaintiff, after a direction to consider whether the order was absolute or conditional, the court refused to grant a new trial.

THIS was an action for money had and received. At the trial before Lord

(a) From a gentleman at the bar.

GIFFORD, C. J., at Guildhall sittings after Hilary term last, it appeared that the plaintiff kept an account with the defendants, who were bankers, and on the 8th of July, 1822, there being at that time a balance of 542*l.* in his favour, delivered to T. Mintern, a partner in the house of J. Mintern and Co., a letter, of which the following is a copy :

“ Messrs. Minet and Stride.

“ Gentlemen,

“ I request you to hold me 400*l.* from my private account, to the disposal of J. Mintern and Co.

“ WM. GIBSON.”

Upon this order being delivered to the defendants about the 13th of July, by T. Mintern, one of the defendants wrote in pencil on the debit side of plaintiff's account,—“ N. B. By Mr. Gibson's letter, 9th July, 1822, 400*l.* is to be held at the disposal of Messrs. J. Mintern and Co.” On the 14th of September, 1822, the defendants sent plaintiff his accounts as made up to June preceding, giving him credit for 543*l.*, at the same time acknowledging the receipt of the order in favour of “Mintern and Co., but not debiting plaintiff for the amount. On the 19th March, 1823, the plaintiff wrote to the defendants countermanding this order, and desiring them to hold the 400*l.* to his own credit, and shortly afterward, on finding that the money was not actually paid out, renewed the countermand. The defendants communicated this to Mintern and Co., requesting their directions. Mintern and Co., upon receipt of the defendants' letter, wrote to them to place the 400*l.* to the credit of their account ; at the same time saying, that they should before that time have directed the above sum to be placed to their credit, but that they were willing the plaintiff should reap the benefit of the interest. The defendants then made the following entry in their books : “ Wm. Gibson, Dr. to John Mintern and Co. Per transferred per order in an old letter of the former, dated 8th July last, now first desired to be acted upon by the latter ; 400*l.* :” and in their ledger debited the plaintiff to that amount. The defendants then informed the plaintiff that they had transferred the money to Mintern. These facts were proved by admissions. On the part of the defendants, one witness stated, that on delivering this order to Stride, one of the defendants, Mintern was asked whether he would have the money then, to which his answer was, that he wished it to be held at his disposal, and that Stride assented. The action was brought to recover the 400*l.* [9

Lord GIFFORD left it to the jury to say, whether it was the intention of the parties that the order should be conditional or absolute. If it was an absolute order, and accepted as such by the defendants, the plaintiff had no right to revoke it. If, on the other hand, it was executory, and they thought that it had not been acted on, the plaintiff had a right to revoke it, and his “countermand came in time. The jury returned a verdict for the plaintiff. [9

Pell, Serjt., now moved for a rule to show cause why the verdict should not be set aside and a new trial granted : he cited Lord ELLENBOROUGH's judgment in *Williams v. Everett*, 14 East, 582 ; but the court refused the rule ; and in giving judgment,

BURR, C. J., said, there is not the slightest pretence for disturbing the verdict. I perfectly accede to the case cited from East : if the money had been actually transferred, or credit given to Mintern and Co. at the time that the order was lodged, it would not have been revocable. But here no appropriation whatever took place ; it was left at Mintern's disposal, and it was not disposed of by them. The defendants have not dealt with the money until after the revocation. The letters show that neither Mintern nor the defendants considered the money as transferred or handed over. If any part of the money had been advanced,

up to that advance the plaintiff would have been answerable, but no further. The jury have done perfectly right.

PARK, J., and BURROUGH, J., concurred; and the

Rule was refused accordingly.

*10]

*FENNER v. DUPLOCK and Another.

Payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knows the precise nature of the adverse claim, or the manner in which the lessor's title has expired.

REPLEVIN. Defendants avowed and made cognisance for one year's rent of a cottage and land, holden by Fenner, as tenant to Duplock. Plea, non tenet.

At the trial before BEST, J., at the last Sussex assizes, the case proved was in substance as follows:

Duplock bought the premises in the year 1798 of Collins, who took them under the will of Brooks. In 1812, Duplock let them to Fenner, who paid rent to Duplock regularly till Collins died in 1815. Judge, the heir at law of Brooks, then set up a claim to the estate, alleging that Collins took only a life-interest under Brooks's will, and Fenner, the rent having been demanded of him by Judge, refused to pay it any longer to Duplock; Duplock distrained, when Fenner, after consulting with his professional adviser, paid the rent to Duplock, and continued to do so till 1821. At that period Judge renewed his claim, and Fenner acquiescing in it, and refusing to pay rent any longer to Duplock, Duplock distrained in 1823, and the present replevin ensued. From some of the evidence in the cause, the jury were induced to believe that Duplock knew he took an estate only for the life of Collins, and that though Fenner, from 1815 to 1821, knowing of the existence of Judge's claim, had paid rent to Duplock, yet that he had paid it in ignorance of the precise nature of Judge's claim, and in ignorance that Duplock had only an estate for the life of Collins; and considering the payments to have been made thus in ignorance, they found a ver-

*11] dict for the plaintiff, under the direction of the learned *judge, who put it to them, whether the payments had been made with full knowledge of the state of Duplock's title.

Bosanquet, Serjt., now moved for a rule to show cause why the verdict found for the plaintiff should not be set aside, and instead thereof, a verdict entered for the defendants, on the ground that payment of rent to Duplock by Fenner, after he knew the existence of, and had consulted on, Judge's claim, was an acknowledgment of Duplock as landlord, equivalent to a new taking, if indeed it did not amount to an actual attornment; and that as he had taken the premises of Duplock, an attornment to Fenner would be void under the stat. of 11 G. 2, c. 19.

BEST, C. J. I entertain the same opinion now as at the trial of the cause: it was a fit question to leave to the jury, whether Fenner, subsequently to the death of Collins, paid rent to Duplock in ignorance of the nature of Duplock's title, and the jury having decided that such was the case, have put an end to any question of law. According to the case of *England v. Syburn v. Slade*, 4 T. R. 682, a tenant, though he cannot dispute the right of his landlord to demise, may show that his title has expired, and the rule is founded on good sense and justice; because if it were otherwise, the tenant might be called on to pay his rent twice over. Although, however, a tenant may show that his landlord's title has expired, yet if he enters on a new tenancy, he shall be bound; but before he can be so bound, it must appear that he was acquainted with all the circumstances of the landlord's title: the landlord, before he enters into any new contract, must say openly, "My former title is at an end;

"will you, notwithstanding, go on?" The defendant in the present case knew that his title was at an end; was it honest in him to persist in his claim, and to call for rent under such circumstances? There is no ground whatever for saying that any attornment took place; payment of rent may indeed be evidence of an attornment; but before we can decide whether an attornment has taken place, we must look at the circumstances, and see whether they do not rebut the presumption of an attornment, and the circumstances of the present case repel any such presumption. The jury have found in what way the bargain was entered on; the defendant knowing he had no title, and the plaintiff not knowing in what way the defect was occasioned; it would, therefore, be gross injustice if we were to set aside the verdict, or grant a new trial.

PARK, J. If the point had been differently stated to the jury, there might have been ground of complaint, but the question was fairly left to them, and it is not material for the court to express an opinion as to the verdict. I think I should not have concurred in it; but as the chief justice has expressed himself satisfied, the verdict ought not to be disturbed.

BURROUGH, J. The question of fact was properly left to the jury, and they having decided it, the rule must be

Refused.

*DOE dem. WILLSON and Others v. PHILLIPS.

[*13

In an agreement to let, in which there was no clause of re-entry, the following stipulation was held to be a covenant, and not a condition operating in defeasance of estate:

"It is also hereby agreed and clearly understood, that in case the said A. W., or his heirs, executors, and assigns, should want any part of the said land to build, or otherwise, or cause to be built, then the said T. R., or his heirs, executors, or assigns, shall and will give up that part or parts of the said land as shall be requested by the said A. W., by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence, at a fair valuation, as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends to do."

This ejectment was brought on the engagement to give up possession, contained in the following agreement:

"Memorandum of an agreement between Mr. Archer Willson, of Stockwell, in the county of Surrey, of the one part, and Thomas Rippon, Esq., of Clapham Road, of the same county, of the other part, viz.:

"A. W. agrees to let (certain pieces of land described in the agreement,) and T. R. agrees to take the above-mentioned pieces of land, for the term of twenty-one years, by paying to A. W. or his heirs, executors, administrators, or assigns, a yearly rent of 30*l.*, clear of all taxes or abatement whatever, either parochial or parliamentary, that are imposed or may hereafter be imposed; and it is also further agreed, and clearly understood, that in case the said A. W. or his heirs, executors, and assigns, should want any part of the said land to build or otherwise, or cause to be built, then the said T. R., or his heirs, executors, or assigns, shall and will give up that part or parts of the said land as shall be requested by the said A. W., by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence, at a fair valuation, as he shall have occasion, from time to time, to take away, by his giving or leaving six months' notice of what he intends to do. And T. R. agrees to fence in the said pieces of "land with new oak-posts, rails, [*14 and pales; to keep the same in good tenantable repair during the term; the walls of the foundation of the intended building to remain as they now stand until wanted to build on; the rent to commence the 29th September next. Witness our hands, this 12th day of September, 1809. And it is also further agreed, that after A. W., or his heirs, executors, or assigns, have taken so much

of the said land, not leaving one acre, or as much as will satisfy T. R., then T. R. shall be at full liberty to relinquish the remaining part of the land; and A. W. agrees to pay to T. R. a fair valuation for the remainder of the said fence, so measured and valued by two proper persons, one chosen by T. R. and the other by A. W., or his heirs, executors, or assigns, and whatever they agree to shall be the price. Also, if A. W. shall have occasion to take down the cow-house on or before the end of five years, A. W. shall pay three-fourths of the expense of the cow-houses, and if within ten years, one half of the expense.

"Witness,

"Henry Willson.

"A. WILLSON.

"THOMAS RIPPON."

The lessors of the plaintiff were executors and devisees in trust, under the will of Archer Willson, and the defendant occupied the premises, under an assignment from Rippon. At the trial before BEST, J., at the last assizes for the county of Surrey, it was contended, on the part of the defendant, that the engagement to give up possession when the lessor should require it for the purposes of building, was not a condition operating in defeasance of the estate, but a mere covenant, for the breach of which the remedy was by an action for damages, or an application to Chancery, but not by ejectment; and BEST, J., being of this opinion, the plaintiff was nonsuited.

*15] *Lawes*, Serjt., now applied for a rule nisi to set aside this nonsuit and have a new trial. He contended that the clause in the agreement for giving up possession, when the lessor should require it for the purpose of building, was a condition, and not a covenant, and he cited *Doe dem. Wilson v. Abel*, 2 M. & S. 541, where Lord ELLENBOROUGH inclined to consider a similar stipulation as a condition. The same construction was pursued in *Russell v. Coggins*, 8 Ves. jun. 34. If the lessor had entered, and had been sued in trespass, he might have pleaded liberum tenementum; and if the demise had been replied, he might have shown that it was determined. *Turner v. Meymott*, 1 Bingh. 158, was an authority to show that the lessor might enter, even forcibly, when the term was determined.

BEST, C. J. The question is, whether this stipulation is a condition or a covenant. I am of opinion that it is a mere covenant; and although the difference may at first sight appear to be technical, I think it is in reality far otherwise. If this be a covenant a court of equity would, upon proper terms, compel a specific performance; but if it be a condition, would send the parties to a court of law, where the lessee would at once lose his land, without being able to enter into those explanations, or call upon the lessor for those proofs of the sincerity of his intentions, which a court of equity would be able to obtain. That court would determine whether it was according to good conscience that the lessor should enforce the covenant, and would compel him to show equitable grounds. For this reason, therefore, I am inclined to consider the stipulation a covenant, rather than a condition, and also because the lessor, if he had intended it to be a condition, might have inserted an express clause of re-entry.

*16] The agreement contains an absolute demise for twenty-one years, and this can only be defeated by terms as strong and express as those by which it is created; but what are the terms here? "It is also further agreed and clearly understood that in case the said A. W., or his heirs, executors, and assigns, should want any part of the said land, to build or otherwise, or cause to be built, then the said T. R., or his heirs, executors, or assigns, shall and will give up that part or parts of the said land as shall be requested of the said A. W., by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence, at a fair valuation, as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends to do." As this is an occurrence which may take place at several different times, every one must see that the matter may be better adjusted in a court of equity than in a court of law; but there is not a single syllable in the

agreement to create a condition, because a condition defeats that which has been before granted, and there are no words here to vest in the lessor of the plaintiff a right of entry. In Mr. Cruise's Digest, vol. iv. p. 426, it is laid down, after an extract from Littleton, as to what words will make an estate upon condition, "There are other words that make a condition in a deed, provided a *power of entry* is added to them. Thus Littleton says, 'The words *si contingat* will create a condition, *if a power of entry* is added; and therefore if A. grants land to B., to have and to hold, to him and his heirs, and if, or, but if it happen that the said B. do not pay to A. 10*l.* at Easter, without more words, this is not a good condition; but if these words be added, that then it shall be lawful for A. *to re-enter*, it will be a good condition.' " But no clause of re-entry is added here. In *Doe dem. Wilson v. Abel* there was an express clause of re-entry, and the only question in that case was, whether 'the lessor might enter on all the parcels at once, or was obliged to give a fresh six months' notice every time he desired to build. In *Russell v. Scoggins* the instrument is not set out, but the reporter calls the stipulation in dispute a proviso, and if it were such, *cadit questio*. I subscribe to the doctrine in *Turner v. Meymott*, but there the lessor had a clear right of entry. The modern cases upon this subject do not in any way break in upon the old: the old are perfectly intelligible, affording a clear rule to guide our decision upon the present occasion; and upon their authority we ought to refuse the rule which has been prayed.

PARK, J. Under the agreement to withdraw from occupation an act is voluntarily to be performed by the defendant, and his interest in the term cannot be defeated by the present proceeding. This clearly appears by the operative words of the stipulation, "that the said Thomas Rippon, or his heirs, executors, or assigns, shall and will give up such part or parts of the said land as shall be requested by the said Archer Willson;" and still more forcibly in the latter part, where it is agreed, "that after Archer Willson shall have taken so much of the said land, not leaving one acre, Thomas Rippon shall be at full *liberty* to relinquish the remaining part."

BURROUGH, J. This is clearly an agreement only, and not a condition, because there are things to be done on both sides; Rippon is to give up on request, and Willson is to make an abatement of rent, according to a valuation.

Suppose there had been a demand of possession and no abatement of rent, the defendant could never have been deprived of his term under such circumstances. I am clear, therefore, that this rule must be

Refused.

SHERRATT v. FLOYER.

[*18]

A cause commenced in the Common Pleas was removed by error into the King's Bench, where judgment was affirmed against the defendant, who then brought error to the House of Lords. The defendant, while the cause was in the King's Bench, having surrendered himself to the prison of that court: *Held*, that the bail might, notwithstanding, while the appeal was yet pending in the House of Lords, enter up an exoneretur upon the recognisance of bail remaining in the Court of Common Pleas.

In January, 1823, the defendant was arrested upon process out of this court for a debt of 75*60l.* Bail were justified in February; judgment was entered up in May, upon which, error was brought in the King's Bench. In November, 1823, the judgment of this court was affirmed, when error was again brought in the House of Lords, and a rule to transcribe served in February, 1824. Defendant surrendered in the Court of King's Bench in discharge of his bail, and was thereupon committed to the King's Bench prison. In April, 1824, the bail applied to Lord GIFFORD for leave to enter an exoneretur on the bail-piece, when his lordship recommended an application to a judge of the Court of King's Bench; which application being made to ABBOTT, C. J., he requested that the matter might be mentioned in court; but

Pell, Serjt., in this term, obtained from this court a rule nisi to enter an exoneretur on the bail-piece.

Taddy, Serjt., who showed cause against the rule, argued, first, that the court could not act unless it were to send the bail-piece by mittimus into K. B.; because the record having been removed by error, the proceedings in this court were at an end, and till the record came back, what had been done upon it could not be known; *Sampayo v. De Payba*, 5 Taunt. 85, (per GIBBS, C. J.): *19] secondly, that the court could not order an exoneretur *to be entered on the bail-piece, unless the terms of it had been complied with, or it had become impossible to comply with them: here they had not been complied with, inasmuch as the defendant had not been rendered to the Fleet prison; *Folkien v. Critico*, 13 East, 457; and it was not impossible to comply with them, because he might be rendered thither at some future time.

BEST, C. J. Two questions have been raised on this motion. First, whether under the circumstances of the case this is the proper court to apply to for entering up an exoneretur on the bail-piece; as to which I am of opinion, that this is the proper and only court for that purpose. Something has been said about a mittimus; but the recognisance is here, and we may act upon it. A case has been cited, from which I do not dissent: I admit we cannot deal with the record because it has been removed, but we may deal with the recognisance because it remains. But, secondly, it has been said that the terms of recognisance not having been performed, it ought to appear that performance is impossible. It is true there has been no performance; but the case falls within the principle of that which has been cited, *Folkien v. Critico*; the defendant cannot be rendered to the Fleet because he has been rendered to the King's Bench; and that jurisdiction will not give him up.

PARK, J., and BURROUGH, J., concurring, the rule was made

Absolute.

*20]

*ANDERSON v. CLARK.

O. had been in the habit of shipping goods at Newry, consigned to A. at Liverpool, to be sold on O.'s account, and of thereupon drawing bills of exchange upon A., frequently, in anticipation of future consignments. On the 5th of January, 1819, there was due to A. a balance of 1659l. arising out of these transactions. On the 6th, O. shipped on board a ship of C.'s goods for Liverpool to the amount of 592l.; consigned them to A., sending him the bill of lading and invoice; and at the same time drew on him a bill for 500l.—A. having refused to accept the bill, O. indemnified C., who thereupon landed the goods at Newry, and re-delivered them to O.: *Held*, that A. might sue C. in assumpsit for the non-delivery of the goods.

This was an action of assumpsit against the defendant, as master of the ship *Hannah*, to recover damages for the non-delivery of 150 whole, and 50 half firkins of butter shipped at Newry, in Ireland, by John Orr, and consigned to the plaintiff in Liverpool on the 7th January, 1819.

The declaration contained two special counts; the first of which stated, that the plaintiff caused the goods to be delivered at Newry on board the vessel, to be carried to Liverpool for freight, in consideration of which the defendant engaged to carry and deliver the same accordingly, and alleged a breach in not carrying and delivering the goods to the plaintiff at Liverpool.

The second count stated that the plaintiff caused the goods to be delivered at Newry on board the vessel, to be carried to Liverpool; and stated that the goods were brought to Liverpool, and alleged a breach in not delivering them to the plaintiff at Liverpool or elsewhere, on tender of the freight and other reasonable expenses.

The declaration also contained the common money counts.

The defendant pleaded the general issue; and the cause came on to be tried at Guildhall before DALLAS, C. J., at the sittings after Trinity term, 1819, when

the jury found a verdict for the plaintiff for 510*l.* 19*s.* 6*d.*, on the ground that the particular course of dealing between the parties gave the plaintiff a right to the goods.

*In the ensuing term a motion was made for a new trial, when the facts were directed by the court to be stated in a case; upon which it appeared, that the plaintiff was a merchant at Liverpool, and the defendant master of the *Hannah*, trading as a general vessel. Mr. John Orr, a merchant at Newry, in Ireland, was in the habit of making consignments of butter from Newry, to the plaintiff at Liverpool, to be sold on Orr's account; and was also in the habit of thereupon drawing bills of exchange on the plaintiff.

During the continuance of these dealings, Orr frequently drew upon the plaintiff in anticipation of future consignments. On the 5th of January, 1819, there was a balance due to the plaintiff on account of such transactions, to the amount of 1659*l.* 15*s.* 1*d.* Such being the state of the account, Orr, on the 6th of January, 1819, shipped 200 casks of butter on board the *Hannah* at Newry, consigned them to the plaintiff, sending to him the bill of lading and invoice, which stated the price of the butter to be 592*l.*, and at the same time drew a bill on him for 500*l.* The plaintiff having refused to accept the bill, Orr indemnified the defendant, who thereupon landed the butter at Newry, and redelivered it to Orr.

A long correspondence between the plaintiff and Orr, together with the account between them, was set out in the case and relied on, on the part of the defendant, to show that the 200 casks were not shipped on the general account between the plaintiff and Orr, but specially to meet the bill for 500*l.*, which, the plaintiff having refused to accept, it was contended he had thereby refused the shipment, and having no interest in it, was not entitled to sue; but the court being satisfied with the finding of the jury on this point,

**Taddy*, Serjt., who had been called on to support the defendant's case, argued, that even if the consignment to the plaintiff could give him such an interest in this butter as to enable him to sue for it in trover, there was no contract between him and the defendant upon which he could maintain an action of assumpsit. Express contract was out of the question; and a contract could not be implied, nor could it be said that the plaintiff had caused the butter to be shipped, when in truth it was shipped by Orr, to be sold on Orr's account, and the defendant was a stranger to the plaintiff. The circumstance that the consignment was to be sold on Orr's account disposed of all the cases in which it had been holden that consignees might sue on an implied contract; for whatever interest the plaintiff might have in these goods, the property in them remained in Orr.

BEST, C. J., and the rest of the Court, however, held that there was no weight in the objection raised. They considered that Orr, in shipping the goods, had acted as the plaintiff's agent, and that though the plaintiff might not have an absolute property in the goods, at all events he had a sufficient qualified interest in them, in the way of security, to entitle him to sue on a breach of contract for non-delivery.

Judgment for the plaintiff.

*WHITE and Another, Assignees of SYMES, a Bankrupt, v. GAINER. [*23]

Defendant, who had a lien on some cloth, purchased it of the bailor after he became bankrupt, and when the cloth was demanded of him by the assignees of the bankrupt, refused to give it up, saying, "I may as well give up every transaction of my life:" Held, that these words were no waiver of his lien, and that the lien was not merged in the purchase.

TROVER for eight pieces of cloth. At the trial before PARK, J., Gloucester Lent assizes, 1824, it appeared that on the 9th of July, 1822, Symes, a clothier,

hearing that a bailiff was in his house, went to sleep at the house of the defendant Gainer, (a dyer and miller of cloth,) to whom he was considerably indebted for work done in the course of his business. The next day Symes, by way of securing Gainer, sold to him the pieces of cloth in question, together with several others, delivering a bill of parcels bearing date a few days before. On the first of August a commission was issued against Symes, who was declared a bankrupt on the 19th.

In September, the plaintiffs demanded the cloths in question of the defendant, who refused to deliver them up, saying, "He might as well give up every transaction of his life," but making no demand. In a conversation in the March ensuing he said, "The thing might have been settled long ago if the assignees would have allowed him his demand for milling and rowing the eight pieces of cloth." The value of the cloths in dispute was 98*l.* 3*s.*, and the defendant's general balance against Symes for milling, dying, and rowing cloth, 188*l.* 11*s.* It was contended at the trial, that the defendant's lien, as far as he had any, was merged in the purchase of the cloth; and that at all events he had waived it by not making any claim in respect of it when the cloth was demanded. The learned judge directed the jury, that the plaintiffs, previously to their demand, ought to have tendered at least the amount of the lien for *24] "workmanship on the cloths in dispute; but he reserved the point as to the merger of the lien for the consideration of this court. A verdict having been found for the defendant, on the issue as to these eight pieces of cloth,

Taddy, Serjt., now moved for a rule nisi to set aside this verdict and have a new trial, on the grounds urged at the assizes; and he cited *Boardman v. Sill*, 1 Campb. 410, to show that the defendant had waived his lien, by not specifying and insisting on it at the time the cloths were demanded of him.

BEST, C. J. I agree in the law as laid down in *Boardman v. Sill*, but not in the application of it now proposed. In that case it was holden, that if a party, when goods are demanded of him, rests his refusal upon grounds other than that of lien, he cannot afterwards resort to his lien as a justification for retaining them. Therefore, if, even in this case, the defendant, when applied to to deliver the goods, had said, "I bought them, they are my property," I should have holden there was a waiver of his lien; but he said no such thing, but only, "If I deliver them, I may as well give up every transaction of my life." Now, his business was that of a miller of cloth, and if he had given up his lien in this instance, he might have been called on to do so always; he therefore refused to deliver them, and it was then for the plaintiffs to consider what offer they should make. It has been urged that he bought them after the bankruptcy. If that were so, he stands in the same situation as every other purchaser under the same circumstances; the purchaser is liable to restore them to the assignees, but the assignees must take them subject to such rights as had *25] accrued previously to their claim, "and the bankruptcy of the bailor will not deprive the defendant of the right to which he is entitled;—the right of lien. It might have been otherwise if the defendant, when called on to surrender the goods, had relied on the purchase; but this was not the case, and the verdict must stand.

PARK, J. If the defendant on the first conversation had said any thing inconsistent with the claim of lien there might have been some ground for this application: but the transactions of his life were milling and rowing cloth, and those were the transactions which he said he might as well give up, if he gave up this. The subsequent conversation puts the matter out of doubt, when he declared the thing might have been settled, if his demand for milling and rowing the cloth had been allowed; and this clearly shows he never intended to relinquish his lien.

BURROUGH, J. If he had said he purchased the cloth, and that the lien

formed part of the price, there might be some ground for the motion. But it is clear the fact was not so.

Rule refused.

*TRICKEY v. YEANDALL.

[26]

Plea to declaration in trespass, that they under whom defendant claimed enjoyed, under a grant to pass through a close as they had been theretofore accustomed to do, a way for themselves and their servants, and with horses, and that defendant therefore entered by himself, and his servants, and with horses:

New assignment, that defendant had used the way for purposes other than those for which they under whom he claimed were accustomed to use it, to wit, with horses carrying bricks.

Plea to new assignment, that they under whom defendant claimed had a right to use, and used, the way, by themselves and with horses, for all lawful purposes, and that defendant had therefore used the way with horses carrying bricks, being a lawful purpose.

Replication, that they under whom defendant claimed did not use the way with horses carrying bricks: Held ill on demurrer.

DECLARATION: in trespass, for breaking and entering plaintiff's close with horses and other cattle, carts and other carriages. The defendant pleaded, first, the general issue, on which issue was joined. Secondly, as to the close in which, &c., that one Honor Bowden, being seised in fee of it, as well as of another close adjoining the said close in which, &c., granted to the plaintiff the close in which, &c., with the appurtenances, except a path six feet wide through the close in which, &c., to the other close, for the owners and occupiers of that other close, "to go, return, and pass through at all times, as they had been theretofore used and accustomed to do;" and further, that the owners and occupiers of the said other close were theretofore "used and accustomed to go, return, and pass by themselves and their servants, and with horses through the said pathway, from a certain public street and highway, into, through, over, and along the close in which, &c., unto and into the other close, and so back again, at all times;" and that Honor Bowden, by deeds of lease and release, granted that other close and the pathway, to him the defendant, in fee, by virtue whereof he became seised of the close, and entitled to the pathway, and being so seised and entitled, he, at the times when, &c., entered into the close in which, &c., by himself and his servants, and with the said horses, as it was lawful for him to do. [27]

There were several other pleas, but no question turned upon them.

The plaintiff replied to the second plea, that the owners and occupiers of the other close were not used and accustomed to go, return, and pass by themselves and their servants, and with horses at all times, as the defendant had alleged; he also newly assigned, that the defendant entered on the close in which, &c., at other times, on other occasions, and for other purposes than those mentioned, and on other parts of the close out of the supposed ways, and also used the ways in another and different manner, and for other and different purposes than the owners and occupiers of the other close were used and accustomed to use the same, viz., with horses laden with and carrying divers bricks, stone, earth, &c., and other materials for building, and for the purpose of carrying the said bricks, stone, earth, &c., into, and using the same in and upon the said other close.

The defendant pleaded to the new assignments, first, not guilty, on which issue was joined; secondly, as to so much of the new assignment as related to using the ways in another manner, and for other purposes than the owners and occupiers had been accustomed to use them, viz., with horses, laden with building materials, and for the purpose of carrying the building materials into the other close, "that the owners and occupiers of the said other close were used and accustomed to use the said ways, to go and pass by themselves and their servants and with horses, for all lawful purposes whatsoever for which they as such owners or occupiers had occasion so to go and pass, for which reason the

defendant, being owner and occupier of the said close, used the ways *with horses laden with bricks* and building materials, for the purpose of carrying them into
 *28] his "close, to be used in building him there a building which he then had occasion, as owner and occupier thereof, to build, *being lawful purposes* for which he had occasion, as owner and occupier, to use the ways.

To the second plea to the new assignments, the plaintiffs, after protesting that it was insufficient in law, replied, that the owners and occupiers of the said other close *were not used accustomed to use*, and in fact *did not use* the ways mentioned *with horses laden with bricks and building materials*.

To this replication the defendant demurred, and showed, for causes of demurrer, that the matters contained in the replication were no answers, and were entirely irrelevant, to the plea to which they were pleaded, also that they neither traversed nor confessed and avoided any of the matters contained in the plea; and also, that the plaintiff had denied, and attempted to put in issue, matters not contained in the pleas, viz., that the *owners and occupiers* of the said other close had not used the said ways with horses laden with bricks and building materials. Joinder in demurrer.

Laves, Serjt., in support of the replication, argued, that, looking back to the exception and conveyance of the way, from Honor Bowden to those under whom the defendant claimed, as set out in the second plea to the declaration, the question upon the whole of the pleadings, was, whether the defendant had used the way conformably with the terms of that exception, namely, as his predecessors "had been used and accustomed to do?" Therefore, whether or no those predecessors had been accustomed to use it with horses carrying bricks was a matter traversable, and strictly relevant, under the original exception. It might be very inconvenient that a way only six feet wide should be used by
 *29] horses laden with panniers, though the grantor might have no "objection to allow foot-passengers and persons on horseback to pass. The mispleading, if any, was with the defendant, who, in his plea to the new assignment, ought to have averred, that they under whom he claimed had been *accustomed to use* the way with horses carrying bricks. By stating that his predecessors were accustomed to use the way *for all lawful purposes*, he had in fact departed from the plea to the declaration, in which it was only said they were accustomed to use it *by themselves and their servants, and with horses*. [BEST, C. J. Should not the plaintiff have taken issue upon the plea to the new assignment, by saying that the defendant and those under whom he claimed had not a right to use the way for *all lawful purposes*?] The plaintiff has done so, virtually, by alleging that they under whom the defendant claimed did not use the way in this manner.

But the Court held the replication ill, and gave

Judgment for the defendant.

Taddy, Serjt., argued in support of the demurrer.

*30]

*LESTER v. KEMP.

By an adjudication of the quarter sessions under an enclosure act for the parish of T., the locus in quo, parcel of a large waste, was found to be in the parish of G., in which K. had a manor: over the locus in quo, B., who had a manor in the adjoining parish of T., had immemorially exercised acts of ownership: K. had also exercised acts of ownership over it occasionally, but they were less decisive than those exercised by B.: in the act of parliament for the enclosure of T., there was an enumeration of B.'s claims in respect of property in T., but no mention of G., nor of any claim by B. in respect of property in G.

Is an action of replevin, in which there was conflicting evidence as to the boundary of B.'s manor, the judge left it to the jury to say whether the soil of the locus in quo was in K. or B., without calling their attention to the question, whether or no the parishes and manors were contumacious: the jury found in favour of K.: *Held*, that the judge had left the case properly to the jury, and that the circumstance of there being in the enclosure act for T. no

mention of B.'s having any claim in respect of property in the adjoining parish of G. was sufficient to warrant the jury in the inference that B.'s manor did not extend beyond T.

REPLEVIN for taking cattle on a spot, which, as described in the avowries, formed four acres, at the east end of a large waste called Tibenham Long Row, over the whole of which it was proved that Sir Robert Buxton, under whom the plaintiff claimed, had from time immemorial exercised rights of ownership, as lord of a manor in Tibenham; but, on a commission for the enclosure of waste land in the parish of Tibenham, the boundaries of the parish had been ascertained and traced out by a ditch, in the year 1821, under the authority of the quarter sessions, and the locus in quo had been found to be within the adjoining parish of Gissing. In the act of parliament authorizing the enclosure, Sir Robert Buxton was stated to be the owner of a manor and lands in Tibenham, and there was in the act no mention of Gissing. Independently of the adjudication by the sessions, there was conflicting evidence as to the parish in which the four acres were situated, and as to the boundary of the manors. It appeared that the defendant had a manor in Gissing, and had exercised some acts of ownership in the four acres, but they were by *no means so numerous [*31] or decisive as those which had been exercised by Sir Robert Buxton. The defendant had avowed the taking, alleging, that the cattle were damage-feasant on his soil and freehold, upon which issue was taken; there were, also, other issues, not material to the present decision. As to this issue, ASBOTT, C. J., at the trial at Norwich Summer assizes, 1823, the defendant having called no witnesses, directed the jury to consider whether the soil of the locus in quo was in Sir Robert Buxton or in the defendant. The jury found the soil of the locus in quo in the defendant.

Taddy, Serjt., obtained a rule nisi for a new trial, on the ground that the verdict thus given was contrary to, or without evidence, no evidence having been adduced to show that the parishes and manors were conterminous, and that as it did not follow as a matter of course that parishes and manors should be conterminous, the jury, before they were directed to consider in whom the soil was vested, ought to have had their attention called to the point, whether or no the boundary of the parish was also the boundary of the manor, and whether any part of Sir Robert Buxton's manor extended into the parish of Gissing.

Pell, Serjt., who showed cause, cited *Hetherington v. Vane*, 4 B. & A. 428; and

Taddy was called on to support his rule. He relied chiefly on the circumstance, that the decisive acts of ownership had been exercised by Sir Robert Buxton; that the act was passed for the enclosing and ascertaining the boundaries, not of the *manor* but of the *parish* of Tibenham: that the act being confined to Tibenham, it *could not notice Sir Robert Buxton's manors or [*32] lands in Gissing, if he had any, and that it did not follow he had no manor or part of a manor in Gissing, because he had a manor in Tibenham: that the division by parishes was purely ecclesiastical, and had no reference to rights of property; and that therefore the adjudication of the quarter sessions as to parish boundaries did not affect the question at issue.

But the Court were of opinion, that the case had been properly left to the jury, and that the jury had formed right conclusions upon it. In coming to this decision the court relied mainly on the circumstance, that in the act of parliament for the enclosure of Tibenham, though there was a distinct enumeration of all Sir Robert Buxton's claims in respect of his manor and lands in Tibenham, it was nowhere alleged that any of them extended into Gissing, nor was there any claim in respect of property in that parish.

Rule discharged

LEADLEY and Others v. EVANS.

A bond, after reciting the appointment of J. B. by churchwardens and overseers, as a collector of church and poor's rates, was conditioned for the duly accounting to the obligees and *their successors* for money received pursuant to and in execution of the office of collector: *Held*, that the obligors were not responsible for receipts on account of any year subsequent to that during which the obligees were in office.

DEBT on bond, by which John Baylie, James Evans, and Matthew Robinson, their and each of their heirs, executors, and administrators, were jointly and severally held and firmly bound unto James Leadley and John Hopkins, *33] churchwardens, and William Farlow and Samuel Nock, overseers of the poor of the parish of Saint Dunstan in the West, in the city of London, and to their successors, churchwardens and overseers of the poor of the said parish, in the sum of 300*l.* to be paid to them the said James Leadley, John Hopkins, William Farlow, Samuel Nock, or to their successors, churchwardens and overseers of the poor of the said parish. Dated the 17th November, in the sixtieth year of the reign of George 3, 1819.

The condition of the bond, as set out on oyer, ran as follows: "Whereas John Baylie hath been appointed by James Leadley, John Hopkins, William Farlow, and Samuel Nock, pursuant to a late order of the vestry of the parish of Saint Dunstan in the West, to the office of collector of the poor and church rate of and for the said parish, now the condition of this obligation is such that if John Baylie shall from time to time, and at all times hereafter, when thereunto required, produce to James Leadley, John Hopkins, William Farlow, and Samuel Nock, or to their successors, or to either of them, a just, true, and faithful account of all such sum and sums of money as shall hereafter be received by him, or that shall come to his hands *as such collector* as aforesaid, and shall well and truly pay, or cause to be paid, unto the said James Leadley, John Hopkins, William Farlow, and Samuel Nock, or to their successors, churchwardens and overseers of the poor of the said parish, or to either of them, all such sum and sums of money as he shall from time to time receive, or that shall come to his hands *pursuant to and in the execution of his said office*, by or on account of the said parish, deducting therefrom such reasonable compensation for collecting the same as shall be agreed on between the said James Leadley, John Hopkins, William Farlow, and Samuel Nock, and the said John Baylie, then this obligation to be void, or else to be and remain in full force and virtue." Breach; non-payment.

*The defendant pleaded several pleas, the third of which was, "that *34] at the time of the making of the said supposed writing obligatory, the said James Leadley and John Hopkins were churchwardens, and the said William Farlow and Samuel Nock were overseers of the poor of the said parish for the then current year respectively; and both the said offices, at the time of the making of the said supposed writing obligatory, were and still are annual offices, and that the said current year expired long before the commencement of this suit, to wit, on the 16th November, 1820; and the defendant further says, that the said John Baylie, in the said condition of the supposed writing obligatory mentioned, did from time to time, and at all times after the making of the supposed writing obligatory, when thereunto required, produce to the said plaintiffs, and to their successors, a just, true, and faithful account of all such sum and sums of money as were, after the making of the supposed writing obligatory, received by him or came to his hands, *as such collector* as aforesaid, for or on account of the poor-rates or church-rates of and for the said parish, *for the said then current year*, or for or on account of the said plaintiffs, as such churchwardens and overseers as aforesaid respectively, or which he the said John Baylie ought to have accounted for or paid to the said plaintiffs as such churchwardens and overseers respectively, or which the said plaintiffs might

have received by virtue of the said offices respectively, and did from time to time, and at all times after the making of the supposed writing obligatory, well and truly pay, or cause to be paid, to the said plaintiffs and to their successors, churchwardens and overseers of the poor of the said parish, all such sum and sums of money as he did, from time to time, receive, or that did come to his hands in the execution of his office in the condition of the supposed writing obligatory *mentioned, by or on account of the said parish, for the said [*35 then current year, or for or on account of the plaintiffs as such churchwardens and overseers respectively, or which the plaintiffs might have received by virtue of their said offices respectively, deducting therefrom such reasonable compensation for collecting the same, as was agreed on between the plaintiffs and John Baylie according to the tenor and effect, true intent and meaning, of the condition of the supposed writing obligatory; and this the said defendant is ready to verify, &c." Demurrer and joinder.

Pell, Serjt., in support of the demurrer. The condition of the bond must be construed according to the intention of the parties, as far as it can be collected from the words employed. From the cases collected by *Serjt. Williams* in his note to *Arlington v. Merrick*, 2 Wms. Saund. 414, n., it appears that where the obligation is of a nature to apply only during the life of a given party, or for any given time, the obligor cannot be called on afterwards: so, where it is entered into, to a firm consisting of three persons, if any of them be changed, or they take in a fourth, the obligation is no longer in force; *Liverpool Waterworks Company v. Atkinson*, 6 East, 507; *Barclay v. Lucas*, 1 T. R. 287, in note to *Barker v. Parker*. But it is obvious that this bond was intended to be in force as long as Baylie should continue to be receiver. The obligors engage that he shall account to the obligees and their successors, which of itself imports that the engagement extends to more years than one. [BURNBOUGH, J. Suppose there should be a death and succession in the same year!—besides, how could the overseers, who have only an annual office, appoint a *col- [*36 lector for more than one year?] If the obligors choose to engage for more than one year, there is nothing illegal in the contract. There would have been no difficulty if they had engaged with a mayor and aldermen and their successors; and a churchwarden and overseers are as much recognised by law as a corporate body. It may be urged, as in *St. Saviour's, Southwark, v. Bostock*, 2 N. R. 175, that the obligors only engage that an account shall be rendered to the successors of sums received during the year of their predecessors; but the words of this condition are much more general and extensive.

Taddy, Serjt., for the defendant, was stopped by the court.

BEST, C. J. This is an action of debt on a bond, which, together with its condition, has been set out on oyer. The defendant has pleaded several pleas, and to the third of them the plaintiffs have demurred. It is material to state the condition of the bond, and the terms of the plea which has been demurred to. The condition of the bond is, that if John Baylie, who had been appointed to the office of collector of the poor-rate, should from time to time, and at all times when thereunto required, produce to the churchwardens and overseers, or to their successors, or either of them, a true account of all such sums of money as should come to his hands, as such collector as aforesaid, and should truly pay to the said churchwardens and overseers, or to their successors, all such sums of money as should come to his hands, pursuant to and in the execution of his said office, the obligation should be void. The *defendant in his [*37 plea alleges, first, that the offices of churchwarden and overseer are annual offices; which, indeed, it was not necessary for him to have alleged, since we should have taken judicial notice of the fact. But to what office was the defendant appointed? that of collector of the church and poor rates; and whose duty was it to collect these rates? The overseer's. The collector, then, is in the nature of a deputy to the overseer, and if the office of the overseer be annual

so must be that of the deputy. He is to account for all such sums of money as come to his hands as such collector, and to pay such as come to his hands pursuant to and in the execution of his said office; but that can only include sums received within the year, because his office continues only during the year. Much reliance has been placed on the condition to account with the successors of the churchwardens and overseers; but it is clear, from the language of *MANSFIELD*, C. J., in the case of *The Wardens of St. Saviour's, Southwark, v. Bostock*, that this accounting to the successors must be of sums payable and accruing due, during the continuance of the predecessors in office, and is introduced in case of the collector, that he may discharge himself by an immediate payment to those who would ultimately have the disposition of the money. The word *successors*, therefore, does not indicate any intention that the defendant should continue to collect rates due after the successors came into office, but only that he should account to them for sums accruing during the preceding year. I agree that the overseers may, if they please, take a bond, which shall render the obligor liable for collections made during the time of their successor; but if they have any such intention, it ought clearly to appear, and it does not appear in the present case. There is no provision for accounting for sums received after the current year of office. The only case that induced me to pause is that *38] *of Metcalf v. Bruin*, 12 East, 400; there it was holden, that a bond given to trustees, to secure the faithful services of a clerk to the Globe Insurance Company, who were no corporation, might be put in suit by the trustees, for a breach of condition committed at any time during the clerk's continuance in the service of the actually existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares. Lord ELLENBOROUGH said, "The only question is upon the fair meaning of the terms used in the obligation, and we must put upon the word *company* the sense in which the parties themselves used it. I will begin, therefore, by translating that word according to the subject-matter, namely, the Globe Insurance Company. It meant a fluctuating or successive body of persons, who should from time to time be carrying on the business of insurance, under the name of the Globe Insurance Company. Now, suppose a bond given to a trustee to secure the performance of certain services to the commoners of such a common, would there be any difficulty in applying it to the use of the commoners for the time being, whoever they might happen to be, during the period for which the services were to be performed?"

That case, however, stands on its own circumstances, and does not apply to any others. From the very nature of the company it is clear the bond was given for the benefit of a body fluctuating from day to day. In the present instance it has not been given for the benefit of a fluctuating body, but is confined to the continuance of the body which first took it. The case of *The Wardens of St. Saviour's, Southwark, v. Bostock*, is pretty much the same as the present, as the condition was, to account to the wardens of the grand *39] account for the time being, or *thereafter to be*; and yet, the collector having been appointed under an office which endured only for a single year, it was holden, that the sureties were not answerable for sums accruing and paid in the ensuing year. But the case of *Peppin v. Cooper*, 2 B. & A. 431, is not distinguishable from the present. There, a bond, after reciting the appointment of Henry Warren to be a collector, under an act which made the office annual, was conditioned for the due collection, by Henry Warren, of the rates and duties at all times thereafter; and it was holden, that the due collection of the rates for one year was a compliance with the condition of the bond. The language of *ABBOTT*, C. J., is most material. "I am of opinion that the condition of the bond is satisfied, by the faithful collection of rates and duties for the space of one year. It is true, that the words at all times hereafter, in the condition of the bond, would, taken by themselves, extend the liability of

the surety beyond that period. But these words must be construed with reference to the recital, and to the nature of the appointment there mentioned; and the recital is, that Warren, together with Peppin, had been appointed collectors under the said act of parliament. Now the nature and duration of that office must be learnt from the act of parliament itself; for if the statute make it an annual office, it is unnecessary to state that fact, either in the bond or in pleading."

So that the court decided, that, notwithstanding the words *at all times thereafter*, the obligor's responsibility was limited to one year by the nature of the office itself. Now, even if we had not been so informed by the plea, we know the offices of churchwarden and overseer to be annual. The words in the condition, therefore, must be narrowed down by the nature of the appointment; and the defendant must have judgment on this plea.

*PARK, J. I do not rely on the cases of *Lord Arlington v. Mer-ricke*, or *The Liverpool Water-works Company v. Atkinson*, because [*40 in those cases there were words which expressly limited the time during which the obligors were to continue liable; but I rely on the nature of this bond, and the situation of the parties to whom it was given. The offices of churchwarden and overseer are annual offices, and must be known to be so, and the defendant cannot be liable for what occurs after the expiration of the year. We have been pressed with the introduction of the word "successors" into the condition of the bond: but it was necessary that it should be inserted, because in case of death, and a new appointment within the year, the collector could not duly account for the receipts even of one year, unless the successors were enabled to receive such accounts. In *The Wardens of St. Saviour's, Southwark, v. Bostock*, HEATH, J., adopts the argument of MANSFIELD, C. J. *Hassell v. Long*, 2 M. & S. 363, also applies to the present case; for there, it appearing by the plea that the office of collector—for securing the faithful discharge of the duties of which the bond was given—was an annual office, the obligor's responsibility was holden to be confined to the current year, although it did not appear on the condition that the collector was appointed only for a year. Although in that case there was express mention of duties which should or might *thereafter be imposed*, Lord ELLENBOROUGH thought that the consequence of giving the condition a more enlarged construction, so as to extend the responsibility beyond the current year, would be of so grievous and burdensome a nature as to require more clear and certain words than were to be found in the instrument; and relying on the case of *The Wardens of St. Saviour's, Southwark, v. Bostock*, he gave *judgment for the defendant. *Peppin v. Cooper*, [*41 however, is the strongest case, and renders the matter so clear as to entitle the defendant to judgment upon this plea.

BURROUGH, J. Independently of any case, the defendant is entitled to judgment in his favour. The offices of churchwarden and overseer are annual offices; and before the defendant can be made responsible for a longer time, it ought to be made appear that the overseers have authority to appoint for a longer time. The word "successors," therefore, comes to nothing, because the collector may find it necessary to account to them for sums which accrued and were paid in respect of the year of their predecessors.

Judgment for defendant on the third plea.

BAKER and Others v. RIDGWAY.

1. A commission of bankrupt having been sued out against defendant, in custody under a ca. sa., the plaintiff, in order to prove his debt, discharged defendant from the execution. The commission having afterwards been superseded, plaintiff took defendant in execution again. The court, from various affidavits, suspecting that the commission and supersedeas had been fraudulently concerted, refused to discharge the defendant on motion.

2. In questions of great amount, the court will not decide between contradictory affidavits, but will order the contested fact to be ascertained by a jury.

Bosanquet, Serjt., obtained a rule nisi to discharge the defendant out of custody as to this action, and to enter satisfaction upon the judgment. The affidavit upon which he moved stated in substance, that in August, 1821, the plaintiffs had obtained a verdict against the defendant for 3303*l.*; that he had been taken in execution under a ca. sa. the November following, for 3417*l.*; that a commission of bankrupt was issued against him in January, 1822; that the plaintiff, Baker, attended *the first meeting under the commission to prove
*42] his debt, but the proof was opposed on account of the defendant being in custody; and that, in February, 1822, the plaintiffs discharged the defendant from custody, and Baker was afterwards chosen assignee under the commission; that the commission of bankruptcy was then superseded; and that in March, 1823, the plaintiff took the defendant again into custody under another *capias ad satisfaciendum* on the same judgment. The plaintiffs' affidavits imputed to the defendant, that he had fraudulently caused to be issued the commission of bankruptcy, with a view to defeat their execution by compelling them to prove under the commission, and then superseding it: they supported this imputation by a great number of circumstances; and they stated that the commissioners required that the defendant should be discharged before they would receive even the offer of proof of the debt under the commission; and that the plaintiffs, being so compelled, made their proof accordingly. The defendant's affidavit denied the existence of fraud.

Vaughan and *Taddy*, Serjts., showed cause against the rule. First, if the commission was fraudulently sued out with a view to defeat the plaintiffs' execution, the proceedings under it are void, and the defendant cannot take advantage of his own wrong. The plaintiffs are entitled, in such case, to act as if the commission had never been issued and the discharge never given; but,

Secondly, even if the commission were not fraudulent, the moment it is superseded all that has been done under it stands as if it had never taken place, and the plaintiffs are remitted to their former situation.

It is true, that, generally speaking, wherever a plaintiff has discharged a defendant out of custody, he cannot *take him again for the same cause
*43] of action; but in order to secure the defendant from recaption, the discharge must have been voluntary. *Jaques v. Withy*, 1 T. R. 557; *Tanner v. Hague*, 7 T. R. 420; *Vigers v. Aldrick*, 4 Burr. 2482; *Blackburn v. Stupart*, 2 East, 243. In the present case, the discharge was not the voluntary act of the plaintiffs, but compelled by the commissioners of bankrupt, and effected by operation of law. Without the previous discharge the plaintiffs were not permitted to prove their debt under the commission: and unless they had proved, they would have lost all chance of recovering their debt. But this compulsion arises entirely out of the operation of the act 49 G. 3, c. 121, under which a party is precluded from proving his debt unless he relinquishes his action. Previously to that act a debtor was not entitled to be discharged, even if the plaintiff sued out a commission of bankrupt against him, *McMaster v. Kell*, 1 B. & P. 302; and as a question like the present could not arise till that act had passed, the recency of its enactment sufficiently accounts for the circumstance of there being no case on the subject. In *Nadin v. Battie*, 5 East, 147, Lord ELLENBOROUGH held, that a discharge under an insolvent debtor's act could not be said to be with the plaintiff's assent; and a discharge obtained under a commission of bankrupt does not differ in principle. The supersedeas of a commission may in some respects be said to resemble the reversal of an outlawry, by which the plaintiff is placed in the same situation as when the proceedings commenced. *St. John's College v. Murcott*, 7 T. R. 259. It may be urged, on the part of the defendant, that a bill is now pending in parliament to enable a plaintiff to retake a defendant in case of a commission of bank-

rapt having been superseded, and that such a bill would not have been necessary unless the defendant were *entitled at common law to retain his discharge : but the bill may, for aught that appears to the contrary, be only [44] declaratory. At all events, the court will not decide on motion a question of such magnitude, but will put the party to his *audita querela*.

The Court here interposed, and, expressing an unwillingness to decide the question of fraud, upon affidavits, in a cause of such importance as the present, urged the defendant to resort to an issue, or an *audita querela*. This, however, being rejected, on the ground that the proceeding was obsolete and difficult, and on account of the absence of a material witness,

Bosanquet and *Wilde*, Serjts., were heard in support of the rule, and, after urging the policy of the ancient law in favour of personal liberty, (in support of which was cited among other authorities the language of the court in *Foster v. Jackson*, Hob. 52. 59.) and the alterations made from time to time by various statutes ;—after arguing the general illegality of taking into custody for the same cause a party who had once been discharged in that cause,—in all which the court seemed to concur ;—they were called on to show that such a recaption would be illegal, even if the discharge were obtained by fraud.

For this they cited *Blackburn v. Stupart*, in which it was holden, that even a scandalous trick on the part of the defendant, by which he had obtained his discharge, would not justify his recaption ; that, in all such cases, the plaintiff was considered to have made his election, and that the discharge would not be affected by fraud in any collateral matter ; as for instance in the present case, by fraud, in suing out the commission ; though it might have been otherwise if there had been fraud in the act of procuring the discharge previous to the *plaintiffs' proving their debt. But if there be fraud, as the defendant is [45] *prima facie* entitled to his liberation, it is for the plaintiffs to establish that fraud. This, however, they have failed to do, for the imputations contained in their affidavits are distinctly denied by the defendant. There is no decision on the subject, because the inconvenience, if any, is one of frequent occurrence, and it has never been imagined that any such remedy as that now resorted to could be safely pursued : that such is the general impression, is apparent from the bill now pending in parliament, which has been mentioned by the counsel on the part of the plaintiffs.

BEST, C. J. There are two questions here for the consideration of the court : First, whether, supposing there was no fraud in the suing out of this commission, the defendant is, under all the circumstances of the case, entitled to his discharge. Secondly, whether he is entitled to his discharge, supposing there has been fraud.

If there has been no fraud in the transaction, I am of opinion the defendant is entitled to his discharge ; if there has been fraud, we are all of opinion he is not so entitled. I have looked through all the cases on execution against the person, from the earliest period down to the present time, and I am aware of the great jealousy of the law on the subject of personal restraint. I am aware that where a party had been discharged on account of privilege of parliament, it was doubted whether he could be retaken after that privilege expired, and the interference of the legislature became necessary to sanction such a proceeding : so where he died in confinement, it was doubted whether the creditor, having resorted to the highest remedy the law afforded, could have any further means for the recovery of his debt, though the debtor left property behind him : that doubt *was also set at rest by the authority of the legislature. I am [46] therefore clear, that where a commission of bankrupt is sued out against a party in execution, he not being privy thereto, if the plaintiff abandons his execution and proceeds against the effects of the party, by proving his debt under the commission, he has taken his chance, and though there should be no assets forthcoming, the defendant is secure in his discharge. (However, I con-

sider myself no more bound by an opinion delivered in the present summary mode of treating the question, than I should be by an opinion delivered at Nisi Prius;) but if the debtor, in concert with others, procures a commission of bankrupt to be sued out against him, or it is procured with his approbation and consent, in order to entrap the plaintiff to come in and prove his debt, and is then superseded for some latent defect unknown to the plaintiff, that does not entitle the debtor to his discharge; and if we were to hold otherwise, we should violate a principle of law which has never been broken in upon, namely, that a party shall not be allowed to take advantage of his own wrong. I say this, because in *Jaques v. Why*, though ASHURST, J., says, "I know of only one case where a debtor in execution, who obtains his liberty, may afterwards be taken again for the same debt, and that is, where he has escaped; but the reason of that is, because he was not legally out of custody;" yet BULLER, J., did not assent to the generality of the proposition thus laid down by ASHURST, J., and wished to introduce qualifications. Indeed, even according to the proposition laid down by ASHURST, J., if this discharge has been obtained by a fraudulent commission, and the plaintiff has afterwards been cheated by a supersedes out of the benefit sought by the proof of his debt, the defendant may be taken again, because the fraud has avoided the whole transaction, and the defendant has never been legally out of custody. But it has been urged that no fraud has been distinctly made out by the plaintiffs, and that it has been positively denied by the defendant. I am of opinion that the fraud has been sufficiently alleged by the plaintiffs, and has not been sufficiently denied by the defendant. This case is important from the magnitude of the sum at stake, but it is still more so on account of the principle I am about to state, namely, that where, in a proceeding on motion, fraud is suggested in the affidavits, and directly denied, we are not absolutely bound by the denial. In matters of ordinary practice, it is a general rule, that he who swears last is to be believed, because there is less evil in occasionally falling into a wrong decision than in generally delaying the suitors of the court: but this rule has never extended to cases of higher importance; and if a fact is controverted in a cause of a certain size, it has been usual to refer it to the prothonotary, and if in a cause of still greater amount, to a jury. That also has been the practice in the Court of King's Bench: in a case of quo warranto, where there is a positive statement on one side, and a positive denial on the other, the court usually directs an issue; so in cases of mandamus; so in cases of usury; the court will not try on affidavit a question of 10,000*l.* or of 1000*l.* Upon these affidavits fraud has been distinctly imputed to the defendant, and it has not been denied to my satisfaction. In order, therefore, to decide the question properly, further proceedings must be had: the law has pointed out what they ought to be, and upon *audita querela*, which is neither a difficult nor an obsolete proceeding, (I remember two within my own time,) the witnesses may be brought face to face before a jury, and the question of fraud satisfactorily ascertained. I think, therefore, this rule ought to be discharged.

*48] PARK, J. I agree in the principles of law laid down by my lord chief justice. It is admitted, that a person who has been regularly discharged from an execution cannot be retaken: from *Vigers v. Aldrick*, downwards, the rule has been so strictly observed, that in *Blackburn v. Stupart*, where there had been very improper conduct on the part of the defendant, GROSS, J., said, that though his conduct had been most scandalous, the rule of law ought not to be impeached; but I am clearly of opinion, that if a party has concocted a commission in order to compel a plaintiff to prove his debt and execute a discharge, the whole transaction being fraudulent, he may be arrested again, since no man shall take advantage of his own wrong. The question here, then, is a question of fact, whether or no the defendant has been engaged in such a fraud,

and as I am unconvinced on this point, I think the rule ought to be made absolute.

BURROUGH, J. I am satisfied that there has been fraud in this instance, and that there are circumstances in the case which deserve further inquiry. The proceeding by *audita querela* is neither obsolete nor difficult: I have seen it adopted three times; and in almost every instance the old modes of proceeding are preferable to the new. I am satisfied, on looking at Sir Samuel Romilly's act, that it was never intended to give it the effect now contended for; and that, with a view to the privileges conferred by that act, a commission superseded is equivalent to no commission. The plaintiffs who proved have been induced, by a force on their mind, to discharge the defendant. Indeed they could not have acted otherwise; for if they had omitted to prove, the other creditors would have signed the bankrupt's certificate, and the plaintiffs would have been left without any hope of recovering their debt. Under these circumstances, and *the conduct of the defendant considered, which is suspicious, upon the [49 very dates of the various transactions, I think there is matter for further inquiry, and that, therefore, this rule must be

Discharged.

LETHBRIDGE, Bart., v. WINTER.

In trespass, the plaintiff newly assigned that his close, the locus in quo, abutted on certain closes called B., M., and S., *some or one of them*: defendant pleaded, that the close newly assigned was his; and issue was joined.

The plaintiff proved at the trial that he had a close abutting on M.; the defendant, that he had a close abutting on B. and S.

The jury found a verdict for the plaintiff on the new assignment.

The court refused to disturb the verdict, to enter a discharge of the jury, or to arrest the judgment,—which were moved for on the ground that the pleadings were not sufficiently certain, and that the defendant had established his own issue.

DECLARATION in trespass, consisting of three counts; the first, for breaking and entering a close of the plaintiff, called The Lane, otherwise Greenway Lane, otherwise Wapshill Lane, in the parish of Ashpriors, in the county of Somerset, felling trees, &c., of the plaintiffs, and taking and converting them to the defendant's own use; second count, for breaking and entering two closes of the plaintiff, one of them called Brickfield, otherwise Brickfield Meadow, and the other, "*being a certain part of a certain lane extending in a westerly direction from the centre or middle part of a certain lane called Greenway lane, otherwise Wapshill Lane, otherwise The Lane situated in the same parish,*" and with feet in walking, and with the feet of horses, and with the wheels of carts, &c., treading down the grass, and then and there felling trees, &c., carrying them away, and converting them to the defendant's own use; third count, *de bonis asportatis*.

The defendant pleaded, first, not guilty, on which issue was joined; secondly, as to the first and last *counts of the declaration, that the trees [50 &c., in the first count mentioned, was his soil and freehold; wherefore, &c.: and thirdly, as to breaking and entering the close in the second count described as being a certain part of a certain lane, &c., he pleaded, that the said close was his soil and freehold; to this plea the plaintiff replied, that the close in which, &c., was the soil and freehold of him the plaintiff, and not the soil and freehold of the defendant; on which issue was joined.

To the second plea the plaintiff newly assigned, that the close in which, &c., in the first count of the declaration mentioned, was "so much of a certain lane or parcel of land called The Lane, otherwise Greenway Lane, otherwise Wapshill Lane, extending from the middle thereof, towards and abutting on the west

on certain closes, respectively called Brickfield, Brickfield Meadow, and Sandy's Four Acres, *some or one of them*:" which close was another and different close from that in the second plea mentioned.

The defendant pleaded to the new assignment, first, not guilty, on which the plaintiff joined issue; secondly, that the close in which, &c., newly assigned, was his soil and freehold; and thirdly, as to committing the supposed trespass newly assigned, in certain parts of the close in which, &c., newly assigned, viz., the part of the lane or parcel of land called 'The Lane, otherwise, &c., extending from the middle thereof, towards and abutting on the west on the close called Brickfield, and also the part of the same lane, extending, &c., and abutting, &c., on the close called Sandy's Four Acres, that the said parts of the close in which, &c., newly assigned, were his soil and freehold.

The plaintiff replied to the second plea, that the close in which, &c., newly assigned, was not the soil and *freehold of the defendant, and to the third, *51] that the said parts of the close in which, &c., newly assigned, were not the defendant's soil and freehold, on both of which points issue was joined.

At the trial before BEST, J., Somerset Summer assizes, 1823, the jury found that all the lane belonged to the defendant, except that part which abutted on Brickfield Meadow; and with respect to that, they found a verdict for the plaintiff on the new assignment.

Bosanquet, Serjt., in Michaelmas term last, obtained a rule calling on the plaintiff to show cause why the verdict found for him on the trial of this cause should not be entered, as to the first issue on the plea of not guilty,—that the defendant was not guilty of the alleged trespasses in the close called Brickfield, otherwise Brickfield Meadow, in the second count mentioned, but was guilty of all the residue;—as to the second issue, which arose in the replication to the third plea,—that the other close in the second count mentioned, was the soil and freehold of the defendant, and not of the plaintiff;—as to the third issue, which arose on the plea of not guilty to the new assignment,—that the defendant was guilty;—as to the fourth issue, which arose on the second plea to the new assignment,—that the close newly assigned was the soil and freehold of the defendant and not of the plaintiff;—as to the fifth issue,—that the parts of the close newly assigned were the close of the defendant and not of the plaintiff:—or why the entry should not state that the jury were discharged from the issue in the new assignment.

He contended, that the defendant having averred that the close newly assigned was his, had in effect followed the language used on the part of the plaintiff, and had therefore averred that the freehold of a close abutting on Brickfield, *52] Brickfield Meadow, Sandy's Four Acres, *some or one of them*, was his, the defendant's; so that the jury, in finding that all the lane was his except that part which abutted on Brickfield Meadow, had in effect found for him, because they had found that he possessed as he averred, a close abutting on some one of the three. [BEST, C. J. But the plaintiff having averred the same with respect to his close, and the jury having found for him, is there any reason for disturbing the verdict?] At all events, the issue was so ambiguous that the jury ought to have been discharged, and a verdict found upon such an issue is bad in arrest of judgment. *Lee v. Maire*, Benloe & Dal. 60, pl. 105—177, pl. 222; 1 Anders. 31, S. C.; Dyer, 264 a, S. C.

Pell and Tuddy, Serjts., who showed cause against the rule, argued, that as the defendant had not expressly named his close in his plea to the new assignment, the plaintiff might safely go to trial on the pleadings as they stood. They referred to Dyer, 23 b, pl. 147. "If in trespass for breaking a close the defendant plead that the place is six acres of land in D., which are his freehold, and the plaintiff reply that they are his freehold, and not the freehold of the defendant; if the plaintiff have six acres in D., and the defendant other six, the

defendant cannot give in evidence that he did the trespass in his own land," and they relied on *Cocker v. Crompton*, 1 B. & C. 469; but

Bosanquet, in support of his rule, observed, that in that case there was no new assignment; and that in the present the defendant had followed the name of the close given by the plaintiff, and denied that the close so named belonged to him.

*BEST, C. J. I think there is no ground for acceding to the present application. In the first count of the declaration the plaintiff has claimed the whole lane as his soil and freehold; in the second, half of it. There are pleas in justification of the trespass, and then a new assignment, in which the plaintiff abandons his claim to the whole lane, or even half of it, but claims a certain part, opposite to three closes which he names, *some or one of them*. The defendant, instead of demurring, takes issue on this claim, and now insists, that as he has proved that he had also soil and freehold opposite to some or one of these three closes, he is entitled to the verdict. But what had the plaintiff to prove? "I am entitled to land opposite to the closes, Brickfield, Brickfield Meadow, Sandy's Four Acres, *some or one of them*." That being the state in which the pleadings have been left by the defendant, the plaintiff proves that he has a close so situated, and has, therefore, done all he could be required to do. It has been urged, that the jury ought to have been discharged for uncertainty; and an old case has been cited in support of such a proceeding, but it is too loosely stated for us to act upon; and even if a decision had been cited to show that we, sitting here in bank, have now the power to discharge the jury, I should pause before I acceded, and should require strong authority to convince me that we have any such power. The defendant has not taken advantage of the defect in the pleading by demurrer in the first instance, and this is not a case in which we are compelled to allow him to take advantage of it after verdict.

The rest of the court concurring, a verdict was ordered to be entered for the plaintiff on all the issues on the new assignment, and the defendant's rule was Discharged.

*ALCHORNE v. GOMME.

[54]

Plea to an avowry of distress for rent arrear, "that before the lessor (who claimed title under a pretended agreement between him and one T. R.) had any thing in the premises, and before the demise by the lessor to the lessee, T. R. mortgaged them in fee to J. C.; that the mortgage being forfeited, notice of the forfeiture being given to the lessee, and the lessee having been required to atorn, and having attorned to the mortgagee, he distrained for the rent, when the lessee paid him, to save the goods from being sold:" *Held ill*.

REFLEVIN for taking plaintiff's goods. Cognisance by defendant as bailiff of Douglas Thompson and Henry Thompson for 43*l.* 15*s.*, being a year and a quarter's rent of a house which it was alleged the plaintiff held and enjoyed as tenant thereof to Douglas Thompson and Henry Thompson, by virtue of a demise reserving the rent in question.

First plea, non-tenuit. Second, riens in arrear. Third plea, that one Thomas Rumball, (before the making of the supposed demise in the cognisance mentioned, and before D. Thompson and H. Thompson had any estate or interest in the said dwelling-house in which, &c., with the appurtenances, or in the messuage or dwelling-house thereafter mentioned to have been released and conveyed by him, and in lieu whereof the said messuage or dwelling-house in which, &c., had been built, or in the ground or soil whereon the said messuages or dwelling-houses were respectively built,) was seised in fee of the said messuage or dwelling-house and other the premises thereafter mentioned; and that the said Thomas Rumball being so seised as aforesaid,—before the making

of the supposed demise in the cognisance mentioned, and before D. Thompson and H. Thompson had any estate or interest in the said messuage or dwelling-house in which, &c., or in the messuage or dwelling-house thereafter mentioned to have been released and conveyed and in lieu whereof the said messuage or dwelling-house in which, &c., was built, or in the ground whereon the said messuages or dwelling-houses were respectively built,—conveyed in

*55] 1812 by lease and release to Collins in fee, (subject to redemption on payment on or before the 25th of July, 1813, of 500*l.*, which the conveyance was intended to secure,) a house at Kensington, which being pulled down in 1816 while Collins was still seised of it in fee, the messuage in which, &c., was built in lieu of it. The plaintiff then averred that Collins, from the time the messuage, in which, &c., was built, had been, and then was seised in fee of the messuage in which, &c., the sum of 500*l.* in the indenture of release mentioned not having been paid to him, Collins: And further, that Collins being so seised of the said messuage in which, &c., with the appurtenances, and the said sum of 500*l.* being unpaid, the said D. Thompson and H. Thompson claiming title to the said messuage in which, &c., (under colour of a certain pretended agreement between them and Rumball for the sale of the said messuage in which, &c., with the appurtenances, made after the making of the aforesaid indenture of release, and after the 25th day of July, 1813, therein allowed for the payment of the said sum of 500*l.*, and after the mortgage thereby made, had become absolute,—whereas no legal estate or interest passed to D. Thompson and H. Thompson in the messuage in which, &c., by virtue of the said pretended agreement,) made the demise in the cognisance mentioned, and thereby demised to the plaintiff, the messuage in which, &c., with the appurtenances; by virtue of which demise the plaintiff became possessed of the messuage, in which, &c., with the appurtenances, and so continued from thence until the time when, &c.; but that the 500*l.* in the indenture mentioned being then still due from Rumball to Collins, and the sum of 43*l.* 15*s.* of the rent in the cognisance mentioned being then still owing from the plaintiff as such tenant as aforesaid, under the demise made to him by D. Thompson and H. Thompson,

*56] Collins, after the 25th day of July, 1813, and before the time when, &c., to wit, on the 26th day of December, 1821, demanded payment of the said sum of 500*l.* from Rumball, but Rumball neglected to pay the same; whereupon Collins afterwards, and whilst the said sum of 43*l.* 15*s.* of the rent in the cognisance mentioned was so in arrear from the plaintiff, and before the time when, &c., to wit, on the 26th day of December, 1821, assented to and confirmed the demise made to the plaintiff by D. Thompson and H. Thompson, and required the plaintiff to attorn to him as such mortgagee as aforesaid, under the demise made to the plaintiff as aforesaid, and to pay the sum of 43*l.* 15*s.* so in arrear from the plaintiff as aforesaid to Collins as such mortgagee, instead of D. Thompson and H. Thompson, and demanded payment of the same from the plaintiff, so being such tenant of the messuage in which, &c., under such demise as aforesaid; and the plaintiff then and there attorned and agreed to become tenant to Collins, and to pay him the said arrears of rent accordingly, but having neglected to pay the same, (although required so to do,) and the said sum of 43*l.* 15*s.* of the said rent being still in arrear from the said plaintiff, and D. Thompson and H. Thompson not having any legal estate or interest in the messuage in which, &c., and Collins being seised thereof as aforesaid, he afterwards, and before the time when, &c., to wit, on the said 26th day of December, 1821, took and distrained the goods and chattels of the said plaintiff, then being in the messuage in which, &c., for the arrears of rent so from him due as aforesaid, whereupon the plaintiff, in order to prevent his said goods and chattels from being sold under the said distress, necessarily and unavoidably paid Collins the sum of 43*l.* 15*s.*, so being in arrear as aforesaid: of all which premises the said defendant afterwards and

before the time when, &c., had notice. And so nothing of the said sum of 43l. 15s. of the rent aforesaid, by the *cognisance supposed to be in arrear, [*57 was then in arrear from the plaintiff to D. Thompson and H. Thompson, in manner and form as the defendant in his cognisance alleged. There was a fourth plea, which differed from the third only in omitting the allegation of an attornment from the plaintiff to Collins. Demurrer to the third and last pleas, assigning for cause that the plaintiff by his third and last pleas neither traversed nor denied the allegations in the cognisance of the defendant that the plaintiff held the dwelling-house in which, &c., as tenant thereof to D. Thompson and H. Thompson under a demise made to the plaintiff, but on the contrary thereof, had admitted that D. Thompson and H. Thompson did demise the dwelling-house in which, &c., to him, the plaintiff, and that he, the plaintiff, entered into and enjoyed the same by virtue of such demise, and had nevertheless attempted to show that D. Thompson and H. Thompson had no title in the dwelling-house, in which, &c., at the time of making such demise by them, and such entry and enjoyment by the plaintiff as aforesaid; and that the plaintiff had not shown, in and by his third and last pleas in bar to the cognisance of the defendant, any demise made by Collins to the plaintiff, or any privity between them which entitled Collins to distrain on the plaintiff, or to call on the plaintiff to pay the said arrear of rent to Collins.

This case was twice argued: by *Laves*, Serjt., for the plaintiff, and *Peake*, Serjt., for the defendant, in Trinity term, 1822; and by *Vaughan*, Serjt., for the plaintiff, and *Pell*, Serjt., for the defendant, in this term.

In support of the distress it was assumed as a principle too well established to be shaken, that a lessee cannot allege that the party under whom he came into possession has no right to confer possession; in other words, cannot plead *nil habuit in tenementis*, or *offer evidence to such effect, Co. Lit. 47 b, [*58 Lit. s. 58; *Palmer v. Ekins*, 2 Str. 817; 11 G. 2, c. 19, s. 11; *Sylli-van v. Stradling*, 2 Wils. 208; *Curvick v. Blagrove*, 1 B. & B. 532; *Cooke, v. Loxley*, 5 T. R. 4; *Phipps v. Sculthorpe*, 1 B. & A. 50; *Parry v. House*, 1 Holt, N. P. C. 489. It was admitted the lessee might show that his lessor's title had expired; that charges had been paid by the lessee, which the lessor was bound to allow, and for which the parties claiming them were entitled to distrain,—and so no rent in arrear: *Sapsford v. Fletcher*, 4 T. R. 511; *Taylor v. Zamira*, 6 Taunt. 524:—or where possession was not originally received from the avowant, might rebut his title, by showing that if he had received rent, it had been under circumstances which did not entitle him to it. *Rogers v. Pitcher*, 6 Taunt. 202. In such cases what was alleged in opposition to the lessor's claim, was no other than a special plea of *riens in arrear*, but the present case was a special plea of *nil habuit in tenementis*, and if allowed to prevail, would virtually repeal the statute 11 G. 2, c. 19, the object of which was not merely to enable the lessor to give his title in evidence on a general allegation, but to prevent the title from being at all put in issue. The plaintiff, admitting by his plea in bar that he came into possession under the Thompsons, was stopped to dispute their right to confer possession.

Argument for the plaintiff. This is not a special plea of *nil habuit in tenementis*, but a special plea of *riens in arrear*, which, the tenant having paid the rent to the party legally entitled to receive it, was authorized to plead. There is no estoppel, because the demise by the Thompsons does not appear to have been by deed; but *on the face of the plea it appears that they had no re- [*59 version in them, and therefore had no right to distrain, for rent is incident only to the reversion. Collins having the reversion was entitled to distrain after the tenant had attorned, which, as soon as the mortgage was forfeited, he was justified in doing under the statute 11 G. 2, c. 19, s. 11. [BURROUGH, J. By that section, if construed with reference to its preamble and the various decisions, the tenant can only be authorized to attorn where the mortgage is sub-

sequent to the date of the tenant's lease.] At all events Collins might without notice have evicted the tenant; *Keech v. Hall*, Dougl. 21; and the tenant, when threatened with the sale of his goods or eviction, was not bound to resist payment till he was actually proceeded against. It would be great injustice if the tenant were compellable to pay the same rent twice. [BURROUGH, J. He could not have been so compelled:—he ought not to have attorned; and if Collins had proceeded to evict him, he might have pleaded the eviction.] By the 4 Ann, c. 16, attornment is rendered unnecessary, and the reversioner may enforce his claim without it; it ought not, therefore, to prejudice the tenant; and in *Moss v. Gallimore*, Dougl. 278, the mortgagee was held to be entitled to distrain without attornment after giving the tenant notice of the forfeiture of the mortgage. [BEST, C. J. In that case the mortgage was subsequent to the lease.] *Taylor v. Zamira* is not distinguishable from the present case. There it was pleaded, that before the lessor had any thing in the land, a termor granted a rent-charge, and covenanted that the grantee might distrain; that the grantee having threatened to distrain for rent arrear, the lessee paid the amount. The plea was holden good, and the language of GIBBS, C. J., is very remarkable, and *60] applies to the present case in every *particular: "This land was subject to a burthen in the hands of the defendant himself; for, before the defendant demised to the plaintiff, the land was subject to a burthen of paying this rent;—" "If the defendant had not paid that burthen, the liability of the land to it would have been no plea, for then it would only amount to the plea of nil habuit in tenementis; but when he adds, that the annuitant *threatened to exercise his right of distress*, we think the two facts combined together, do constitute a complete defence." In the present case, before the Thompsons demised to the plaintiff, the land was subject to the burthen of the mortgage, and the plaintiff paid the rent in consequence of the mortgagee having threatened to distrain.

BEST, C. J. This is an extremely clear case. It is a rule which has been established for centuries, that a tenant is not permitted to dispute his landlord's title to confer possession at the time of the demise, although he may certainly show that the title determined afterwards. It is therefore only necessary to look at this plea, and see if it falls within the general rule; for if it does, it is clearly bad. In *Sullivan v. Stradling*, it was expressly holden that a plea of nil habuit in tenementis could not be supported, and if this plea amounts to nil habuit at the time of the demise, unqualified by any of the subsequent cases, it cannot be sustained. Now, what is the plea? "That before the Thompsons had any thing in the premises, and before they (claiming title under a pretended agreement between them and one Rumball) demised them to the plaintiff, Rumball had mortgaged them in fee to Collins; that the mortgage being forfeited, notice of the forfeiture being given to the plaintiff, and he being required to attorn, did attorn to Collins when Collins distrained for the rent, which the plaintiff *61] paid him to prevent the goods from being sold under the *distress." According to this, the Thompsons, long before the plaintiff came into possession, were precluded from acquiring any right to these premises, Rumball having granted them away to another. The plea, so far from admitting they had any title at the time of the demise, calls the agreement a pretended agreement, and expressly alleges that no legal estate or interest passed under it: a plea could not in stronger terms allege that the lessor nil habuit in tenementis. It then goes on to state that the plaintiff attorned to Collins, and became bound to pay him the rent: if so, it was the plaintiff's own fault, because he was not bound to attorn.

It has been urged, that what has been done by the plaintiff is equivalent to payment, and that this plea is no other than a special plea of riens in arrear: but if so, it may be equally contended that non tenuit is a plea of riens in arrear. Now it is quite clear that a party cannot plead indirectly that which he

cannot plead directly; he cannot, by adding words, effect that which he would not be permitted to effect if it were stated simply; and the rule which prohibits a tenant from disputing in a court of law the title of his landlord, is a wise rule, tending to general convenience, especially when there is another court in which he may insist on any equities which the case may involve. I am aware that there is a qualification of this rule, if qualification it can be called, and that there are cases in which the tenant has been permitted to show that the landlord could not justify a distress: in all of them, however, the right of the landlord to demise has been admitted, and the plea has been, either that his title has since expired, or that the tenant has been compelled to pay sums which he was entitled to deduct from the rent; these cases, therefore, rather confirm than impeach the general rule: but the tenant here broadly disputes the lessor's right to demise. The statutes of 4 Ann. c. 16, and 11 G. 2, c. 19, have nothing *to do with the case: they were passed in case of the reversioner, [*62 and enable a mortgagee to distrain without a formal attornment, where the reversion has been conveyed to him after the creation of the lessee's term, so that he could not proceed by ejectment. The decision in *Moss v. Galkimore* applies also to the same circumstances; but from *Keech v. Hall*, where, as in the present case, the lessee's term was created by or under the mortgagor after the mortgage, it appears that the mortgagee must proceed by ejectment. I hope, that in the present case, no injustice will be done; if it should be otherwise, we cannot help it. It is impossible to administer justice so beneficially by aiming at it in each particular case as by adhering to general rules.

PARK, J. I can concur in what has fallen from my lord chief justice, and think we may decide in favour of the defendant, without interfering with the decision in *Taylor v. Zamira*, and the other cases of that class. In *Taylor v. Zamira*, the land was expressly subjected to distress by a charge created before the lessor's title commenced. In the present case, unless the tenant had attorned, though the mortgagee might have evicted, he could not have distrained. Besides, in the cases alluded to, the lessor's right to demise has always been admitted in the first instance. Here it is expressly denied.

BURROUGH, J. If the plaintiff would have suffered injustice by paying this rent to the Thompsons, he ought to have applied to the Court of Chancery. The cases between lessee and mortgagee, where there was a lease outstanding at the time of the mortgage, do not apply to the present, and I am satisfied that the plea is bad.

Judgment for defendant.

*BANE v. METHUEN and Others.

[*63

Where a statute gives a justice jurisdiction over an offence, it impliedly gives him power to apprehend any person charged with such offence: *Held*, therefore, that a magistrate might issue a warrant to apprehend a person charged with an offence under the malicious trespass act, 1 G. 4, c. 56, especially after the offender had neglected a summons.

THE plaintiff sued the defendants, (two magistrates and a constable,) in trespass for an apprehension and detention under the following warrant:

"Wilts. to wit. To the constables of Castle Combe, in the said county, and to all other constables, tithing-men, and others whom it may concern.

Forasmuch as William Taylor, of the parish of Castle Combe, in the said county, shopkeeper, hath this day made information and complaint upon oath before us, two of his majesty's justices of the peace in and for the said county, that hath good cause to suspect, and doth suspect, that William Bane, late of Castle Combe, in the said county, sadler, did, on Thursday, the 6th of February last, wilfully and maliciously break the windows of an uninhabited dwelling-house in the said parish of Castle Combe, the property of the said William Taylor, by shooting at the same with a gun; and the said William Bane having

been duly summoned to appear before us to answer the said complaint, hath neglected so to do; these are, therefore, to command you, in his majesty's name, to apprehend and bring before us, or some other of his majesty's justices of the peace for the said county as shall be assembled at the petty sessions, to be holden at the Methuen Arms, in Corsham, in the said county, the said William Bane, on Wednesday, the 19th of the present month, to answer unto the said complaint, and to be further dealt withal according to law. Herein fail you not. Given under our hands and seals the 5th of March, 1823."

At the trial before BEST, J., Salisbury Summer assizes, 1823, the neglect of *64] summons stated in the warrant "having been proved, and also that the magistrates, after the apprehension of the plaintiff, convicted him of a malicious trespass, under the 1st G. 4, c. 56, the learned judge directed a nonsuit, with liberty for the plaintiff to move to enter a verdict, it having been urged on his part, that there was no clause in the above act of parliament authorizing the magistrates to apprehend him till after conviction.

Vaughan, Serjt., having on this ground obtained a rule nisi, after citing *Shergold v. Holloway*, 2 Str. 1002, and *Hill v. Bateman*, 1 Str. 711,

Pell, Serjt., (and Taddy, Serjt., was with him,) now showed cause against the rule. In the first of the cases cited the magistrates had no jurisdiction; in the second, the proceeding ought to have been by distress; but by the general law a magistrate cannot decide *ex parte*, and is therefore bound to summon the party charged with an offence; if he omits to appear, a warrant to apprehend becomes necessary to enforce the summons, and such a warrant the magistrates are authorized to issue. It is clear that when an act of parliament gives a justice jurisdiction over an offence, it impliedly gives him a power to make out a warrant, and bring before him any person charged with such offence. *Hawkins*, P. C., b. 2, c. 13, s. 15; 12 Rep. 131 b. *The Queen v. Simpson*, 10 Mod. 248. As to the act in question, by the third section constables are empowered to apprehend for an offence, even without a warrant.

Vaughan said nothing in support of his rule, which was immediately

Discharged.

*65]

RYLAND v. LAVENDER and Others.

Defendant, as jailor, covenanted with the sheriff, among other things, to attend the quarter sessions, and to remove prisoners, under writs of habeas corpus, without permitting them to escape.

The defendant being engaged at the quarter sessions, the sheriff, upon a writ of habeas corpus for the removal of a prisoner, directed his warrant to the defendant, and "W. W. by me (the sheriff) for this time only thereto specially appointed."

W. W., who was the defendant's turnkey, proceeded with the prisoner towards the place of destination.

The prisoner having escaped: *Held*, that the sheriff having specially directed the warrant to W. W., the defendant was not liable upon his covenant.

DEBT on a bond conditioned for the performance of covenants in an indenture between the plaintiff, sheriff of Worcestershire, of the one part, and the defendant Lavender, keeper of Worcester jail, of the other part, under which he engaged, among other things, well and truly to keep the persons committed to his custody, and to have them forthcoming until lawfully discharged; to indemnify the plaintiff against any charges, loss, or damages, by reason of the escape of any prisoner; to give his personal attendance at every assize, general jail delivery, and sessions of the peace within the county; and when any writ of habeas corpus for the removal of any prisoner should be served on the sheriff, his under-sheriff or deputy, or on the jailor, to convey by the commandment or appointment of the said sheriff, his under-sheriff or deputy, safely and without escape, all prisoners to and from the jail of the county to such court or place as the writ should direct. Plea, performance: breach, (in replication,) that the defendant Lavender, set at liberty, without the discharge of the plaintiff, or his

under-sheriff, or any legal discharge, one William Tyndall, who had been committed to his custody under a ca. sa., whereby the plaintiff was obliged to pay 79l. 12s. 9d. for debt and costs due from Tyndall, and laid out a large sum of money in endeavouring to set aside an attachment, and to retake Tyndall. Rejoinder, *that Lavender did not set Tyndall at liberty, in manner and form as had been alleged, upon which issue was taken. [66

There was a second plea, alleging, that if the plaintiff had sustained any damage it was through his own fault, upon which there was a demurrer and joinder in demurrer.

At the trial of the issue before PARK, J., Gloucester Summer assizes, 1823, it appeared that a habeas corpus had issued from the Exchequer, ordering the sheriff to produce Tyndall, before Mr. Baron Wood, in London; that the person who served the habeas corpus paid the defendant Lavender, beforehand, the expenses of conveying Tyndall to London; that Lavender being, at the time of the service, obliged to attend with prisoners at the general quarter sessions for Worcester, the warrant for the removal of Tyndall was, by the sheriff, addressed to Lavender, "and also to William Williams, for this time only, by me thereto specially appointed;" that Williams, who was a turnkey under Lavender, proceeded with Tyndall to London; that Tyndall escaped, and that Lavender's clerk, meeting him afterwards, desired him to return, when he refused to do so, alleging that he had escaped by the negligence of the sheriff.

A verdict having been taken for the plaintiff, with liberty for the defendants to move to enter a nonsuit instead, if the court should be of opinion that Lavender was not liable under the terms of his covenant,

Pell, Serjt., now showed cause against a rule which had been obtained by Bosanquet, Serjt., to that effect, on the ground that Williams having been appointed special bailiff to conduct Tyndall to London, Lavender was thereby relieved from all responsibility.

*Pell argued, that the appointment of Williams as special bailiff, though it gave Lavender a coadjutor, did not exonerate him from responsibility. [67 The special appointment did not include Lavender, because he, as jailor, had undertaken by the covenant safely to convey prisoners, on writs of habeas corpus, in the ordinary execution of his duty. For this duty he had actually received payment in advance.

So the question stood upon the merits, but upon the form of the pleadings the issue was clearly against the defendants. The issue tried, was not, whether Lavender or Williams were, or either of them was, or not, special bailiff; or whether a special bailiff, and not the covenantor, had allowed Tyndall to escape; but, the replication having alleged that the defendant Lavender set Tyndall at liberty *without any legal discharge*, and the defendants having rejoined, that he did not set Tyndall at liberty in *manner and form* as had been alleged, the real issue was, whether Tyndall had been set at liberty without a legal discharge, and that he had been so set at liberty was clearly proved.

Bosanquet, contra, was stopped by the court.

BEST, C. J. I think that in this case a nonsuit ought to be entered. This is an action by the sheriff of Worcestershire, against Lavender, a jailor, and his sureties, on a bond conditioned for the good conduct of Lavender in his office of jailor, and for his observing the covenants contained in an indenture which specifies the duties of his situation. It is clear that the securities were taken only with reference to those duties. I agree that it was part of Lavender's duty, as jailor, to convey prisoners under the authority of writs of habeas corpus, because it is expressly provided for by the indenture to which the bond refers; "and when any writ *of habeas corpus, for the removal of any prisoner, shall be served on the sheriff, his under-sheriff, or deputy, or on the jailor,—to convey, by the commandment or appointment of the said sheriff, his under-sheriff or deputy, safely and without escape, all prisoners to and [68

from the jail of the county to such places or place as the writ shall direct." He is also bound by the same indenture to attend the quarter sessions of the peace; and it appears that at the very time the writ in question was delivered, his presence was actually required at a session then pending. But though he was required to attend the sessions, the sheriff might say that he ought to have provided a sufficient deputy for the conveyance of prisoners under writs of habeas corpus, and if the sheriff had directed his warrant for removal, to the jailor Lavender and his deputy Williams, the jailor might have been responsible had the deputy conducted himself negligently. But the sheriff has not done this; his warrant does not name Williams as deputy, but as invested with authority equal to that of Lavender; the words are, "and also to William Williams, for this time only, by me thereto specially appointed;" Williams would therefore have a right to control the proceedings under the writ, and if Lavender proposed to go one way, might insist on pursuing another; Lavender, therefore, was not acting under his covenant, but under a new authority. He might fairly say he was acting not by himself, but under a special authority to himself and another; and if he might say this, his sureties might with still greater reason urge, that though they were willing to repose confidence in Lavender, they would not have done so if he were to be controlled by another. It would be a great hardship to make them responsible for the conduct of any one besides Lavender. On the principal question therefore, it is quite clear that the safe conduct of

*69] Tyndall, under a habeas corpus, entrusted specially to *Williams, is not an engagement within the scope of Lavender's covenant: and as for the issue on the pleadings, it ought to have been found in favour of the defendants. The issue is, that Lavender allowed Tyndall to escape without a legal discharge: but neither Lavender nor his deputy allowed this;—not Lavender, for he was not present;—not his deputy, for Williams was not his deputy.

PARK, J. At the trial, I first thought that Williams was Lavender's deputy; but when the warrant was put in, it altered the whole complexion of the case. I admit that Lavender was bound by his covenant duly to execute all writs of habeas corpus which called for the removal of a prisoner in his custody; and if the sheriff had directed the warrant to him, and the prisoner had escaped when under his charge, he would have been liable; but when the sheriff takes the conduct of the writ out of his hands he ought not to be liable; he might say he was content to trust Williams with the care of the jail, subject to his own inspection, but not with the removal of a prisoner out of his sight. When, therefore, the sheriff takes the control out of the jailor's hands, and vests it in one for the express purpose specially appointed, he releases Lavender from his responsibility; and if Lavender has a claim to be exonerated, his sureties have a much stronger: they know nothing of the sheriff or the person he may appoint: I think, therefore, the defendants are clearly entitled to have this rule made absolute.

BURROUGH, J. The jailor was discharged when the warrant gave Williams as much authority as himself: besides which, he had two independent duties to perform; to attend to the warrant and to go to the quarter sessions; he could *70] not do both, but was bound to attend *to one, and leave the execution of the other to Williams; so that there is no pretence whatever for charging him with negligence.

Rule absolute.

DOE dem. WHALHEAD v. OSSINGBROOKE.

There may be concurrent customs in a manor court to bar copyhold entails, by surrender and by recovery.

THE question in this cause, which came on for trial at the Nottingham Summer assizes, 1823, was, whether the entails of copyhold estates, lying within

and being parcel of the manor of Collingham Northby, and Southby, can, by the custom of the manor, be barred by surrender, or only by a recovery suffered in the manor court. Forty-seven instances of barring by recovery, and seven of barring by surrender were proved; whereupon the jury found that a recovery was necessary, and a verdict was taken for the plaintiff.

The learned judge who presided having omitted to state to the jury that the customs of barring entails by surrender and by recovery might be concurrently good,

Taddy, Serjt., in Michaelmas term last obtained a rule nisi for a new trial, and the question coming on now to be argued by *Faughan*, Serjt., who showed cause against the rule, and relied on the language of *DAMPIER, J.*, in *Doe d. Bennett v. Jeffery*, 2 M. & S. 92,

The Court referred to *Everall v. Smalley*, 2 Str. 1197; *Doe d. Wightwick v. Truby*, 2 Bl. 946, as conclusive, on the point that both the customs might be concurrently good, and made the rule

Absolute.

*GRAVENOR v. WOODHOUSE and THOMAS and Wife. [*71]

Avowries, first by W. and T. for rent due to W. and T. from plaintiff, as tenant to W. and T.; secondly, as tenant of the premises; and, thirdly, by W. and T. and his wife, in right of his wife, for rent due to W. and T. and his wife, in right of his wife, from the plaintiff, as tenant to W. and T. and his wife, in right of his wife; were holden to be supported by evidence of an attornment from plaintiff to W. and T. and his wife.

THIS was a special case arising out of the cause reported, ante vol. i. p. 38, on the construction of a will of certain lands in Herefordshire; but it appearing on the case, that the plaintiff, who now disputed in an action of replevin the defendants' title, had actually attorned to them in a prior action of ejectment, the court refused to enter into the question on the will, and the only point discussed was, whether three avowries in replevin,—first, by Woodhouse and Thomas for seven years' rent due to Woodhouse and Thomas from the plaintiff as tenant to Woodhouse and Thomas; secondly, by Woodhouse and Thomas for seven years' rent due to Woodhouse and Thomas from the plaintiff as tenant of the premises under a demise made to him at the yearly rent of 70*l.*; thirdly, by Woodhouse, and Thomas and wife, in right of his wife, for seven years' rent due to Woodhouse, and Thomas and his wife, in right of his wife, from the plaintiff as tenant to Woodhouse, and Thomas and his wife, in right of his wife,—were supported in evidence by a declaration in ejectment between John Goodtitle, on the demise of Edward Woodhouse, James Thomas, and Anne his wife, plaintiffs, and Richard Notile, defendant, followed by the ensuing attornment; “I, Peter Gravenor, the tenant in possession of the premises in question in this cause, do hereby attorn and become tenant to the lessors of the plaintiff, Edward Woodhouse, James Thomas, and Anne his wife, of and for all that messuage, farm, and lands, called the Parks, situate in the parishes of Bingham, Wellington, and Canon *Pyon, in the county of Hereford, from the 2d day of February instant, for one year, and so from year to [*72] year, at the yearly rent of 70*l.*, subject and without prejudice to any right or claim I may have in equity in the said estate, as against the said lessors, or the devisees, legatees, or executors of James Woodhouse, Esq., deceased: As witness my hand this 9th day of February, 1814.

Witness, *J. Hawkins*.

PETER GRAVENOR.”

This point had, on the former decision, been abandoned without argument on the part of the plaintiff, but was now contested by

Laves, Serjt. The title set out on the declaration in ejectment, is a mere jointenancy in three persons in their individual capacities, and under that ejectment the lessors of the plaintiff could not avail themselves of any tenancy in common, any divisible estate, or any estate in right of the wife. But the

attornment does not aid the defendants, for whether taken by itself or connected with the declaration, it does not carry the acknowledgment any further; the plaintiff attorns to Edward Woodhouse, James Thomas, and Anne his wife; not to James Thomas in right of his wife. If so, the avowries are not applicable, for there is no one avowry for a jointenancy in three; the two first avowries are for a jointenancy in two, and the third is in right of the wife, of which right there is no mention in the declaration or attornment. It is true, that a husband may declare upon a contract to himself and wife, as a contract to himself, *Nooth v. Wyard*, 2 Bulstr. 233; *Parry v. Hindle*, 2 Taunt. 180; *Arnold v. Revoult*, 1 B. & B. 443. But the incidents of an action on a contract are altogether different from those of replevin on a distress for rent arrear.

*73] The rent which is proceeded for by "distress, is incident to the reversion; it often becomes payable to parties not named in the original lease, it ought, therefore, in the avowry to be shown strictly who has a right to take the rent under the reversion. Littleton, s. 316, says, husband and wife may sue jointly upon a contract, but ought to sever in an avowry.

Bosanquet, Serjt., contra, cited *Wise v. Bellent*, Cro. Jac. 442; *Bowles v. Poore*, Cro. Jac. 282; *Osborne v. Walleeden*, 1 Mod. 273; *Pullen v. Palmer*, 3 Salk. 207, in support of the position, that a husband may avow in his own name for rent due in right of his wife, and observed, that the passage relied on in Littleton was marked with an obelisk, as one of those which were not originally in the text. The second avowry, therefore, was clear of all objection.

Lawes in reply. Admitting that a husband may avow alone for rent due in right of his wife, nothing is said in the attornment of any interest of his in right of his wife; on the contrary, it would appear from the attornment that he had a separate interest of his own.

BEST, C. J. I think that there is no variance between the avowries and the proof adduced in support of them. It appears that the avowries are made, first, by Woodhouse and Thomas for seven years' rent due from the plaintiff as tenant Woodhouse and Thomas; secondly, by Woodhouse and Thomas for rent due to them from the plaintiff as tenant of the premises; so that they clearly insist that the plaintiff holds under them. It has been urged that, according to the attornment, the wife has also an interest which ought to have been stated in the avowries; but it appears by cases to which we have been referred, that *74] as the husband may sue alone upon a covenant to himself and his wife, so he may avow alone, where he is landlord in her right: we have then to see whether the attornment and the demise in the declaration in ejectment support these avowries. The demise is by Edward Woodhouse, James Thomas, and Anne his wife, and the plaintiff by his attornment has admitted that he holds under Edward Woodhouse, James Thomas, and Anne his wife; but Woodhouse and Thomas have avowed, and the avowry by Thomas includes any interest he might have in right of his wife.

PARK, J. I am of opinion on the authority of the cases, that these avowries (at all events the second) are supported in evidence by the attornment and declaration in ejectment. My difficulty was on the difference between actions of contract and replevin, but the authority in *Croke* and 1 Mod. Rep., and the reference made by Lord Holt to the case in *Croke* have satisfied me. The husband had a right to distrain in his own name for any interest he had in right of his wife, and the attornment, therefore, supports the avowry.

BURROUGH, J., concurring,

Judgment was given for the defendants.

In the Matter of GARBUTT.

Attorney.

Peace, Serjt., moved to strike *Garbutt* off the roll of attorneys, and to commit one *Palmer*,—upon an affidavit which stated that at a town eight miles off from that in which *Garbutt* lived, *Palmer*, who had been *Garbutt's* *clerk, resided, and carried on business at an office over which was written [*75 "*Garbutt's* office ;" and that *Garbutt*, though he attended the town on market days, never entered this office, but transacted all his business at an inn.

But the Court said, that however they might reprobate in an attorney the practice of thus stationing his jackalls about the country, they could not visit his conduct with consequences so highly penal, unless the affidavits showed a participation in profits, or something like it ; and *Peake*

Took nothing.

HOLMES v. HOLMES.

Costs.

UPON a motion by *Taddy*, Serjt., for the prothonotary to review his taxation in this cause, (an action on the case for disturbance in the enjoyment of a water-course,) the Court confirmed the prothonotary in allowing the expense of such plans as had been used for the information of the court.

*HOLMES v. GORING.

[*76]

HOLMES v. ELLIOTT.

A way of necessity is limited by the necessity which created it, and ceases if at any subsequent period the party entitled to it can approach the place to which it led, by passing over his own land.

THESE were actions of trespass for breaking and entering plaintiff's close at Lymister, otherwise Leominster, in Sussex, and forcing and breaking open his gate and its fastenings.

The defendant *Goring* pleaded, first, not guilty, on which issue was joined ; secondly, a right of way of necessity, alleging that the close in which, &c., together with another close adjoining on the east, did lie between two other closes belonging to the defendant, and in the occupation of *William Elliott*, as his tenant ; that the defendant, at the time of the conveyance afterwards stated, was seised of all the four closes, and on the 7th October, 1801, enfeoffed *George Duke* of the close in which, &c., and the other close adjoining thereto on the east, and that at the time of the feoffment, defendant had no other way to one of the said closes in the occupation of *Elliott* but over the close in which, &c., and the other close adjoining thereto on the east, and was therefore entitled to, and still of right ought to have for himself and tenants a convenient and necessary way thereto over the close in which, &c., and in the exercise thereof committed the supposed trespasses.

Replication, that the defendant had not necessarily, and of right ought not to have had, and still of right ought not to have for himself and tenants such convenient and necessary way as in the said second plea mentioned, in manner and form as in that plea alleged.

The plaintiff also made new assignment.

*Issue was joined on the above replication to the special plea, and also upon a plea of not guilty to trespasses newly assigned. [*77]

These issues came on to be tried at the Sussex Spring assizes, 1822, before *Wood*, B., and a special jury, when a verdict was found for the plaintiff on the

said *second plea mentioned, the occupier for the time being of the close 4 had been accustomed to drive wagons and carts from the highway over the southern extremity of the close 1, 2, and 3, into close 4, and so back again, for the convenience, use, and occupation of the said last-mentioned close. [*79]

The plaintiff contended, that from the time of the feoffment in 1801, the defendant and his tenant, even though they should up to that time have had a way of necessity over the locus in quo, ought to have gone from the Arundel Road over his own land, the fifth close, towards close 3, without going over the close 2; and that at the time of the trespasses, they might and ought to have gone from the Arundel Road into close 4, entirely over closes 5 and 6, defendant's own lands.

The defendant contended that the necessity of the way was to be considered with reference to the situation of the properties at the date of the feoffment.

The learned baron, in an early stage of the trial, required that these points, if raised by the evidence, should be reserved for the opinion of the court. The jury found that the ancient and usual way from and to close 4 had been and was immemorially over said closes 3, 2 and 1, into the said highway.

The question for the opinion of the court was, whether, under the circumstances above mentioned, the defendant was entitled to a verdict on the issue so joined on the replication to the second plea, and if the court should be of opinion in the affirmative, the verdict was to be entered, and defendant to have judgment according to that opinion; but if the court should be of opinion on the other hand, that the plaintiff was entitled to a verdict on that issue, then the verdict was to be entered for the plaintiff generally.

In the other action against Elliott, Goring's tenant, there was a third plea, stating a right of way by non-existing grant; and in which it appeared that Elliott *had married Mrs. Falconer, and occupied close 5. In other respects, the two cases were alike. [*80]

This case was argued twice: by *Lens* and *Taddy*, Serjts., in Trinity term, 1823, and by *Bosanquet* and *Taddy*, Serjts., in this term (Easter, 1824.)

Arguments for the plaintiff. At the time of this action the defendant had no way of necessity over close 2, the locus in quo. If he had one by prescription previous to the year 1798, it was then extinguished by his purchase of close 2 in fee. *Buckby v. Coles*, 5 Taunt. 311. But there was even in 1798 no necessity for a way, and, consequently, no way of necessity for the defendant, as occupier of close 4, over close 2 into the Arundel road; he might have reached the road in as direct a line by passing out of close 3 into and along the north side of his own close 5; and this he might equally have done, even after he had parted with closes 2 and 3 by feoffment in 1801. But in 1810, when he was in possession of the whole of close 6, he might have passed out of the southwest corner of close 4 into close 6, and along the north side of that close and of close 5 into the Arundel road; so that at the time of the action there was no necessity for his passing over either close 2 or close 3; he might have reached his destination by as direct a course entirely over his own land. It is clear, that a way of necessity is limited by the necessity, and when the necessity ceases the right of way ceases; *Packer v. Welstead*, 2 Siderf. 39; *Staple v. Heydon*, 6 Mod. 4; but in the present case the defendant's grant must be taken most strongly against himself, and it is impossible to contend that there was an implied reservation for him to pass over the land of his feoffee, when he might avoid it by passing over his own.

*Arguments for the defendant. A way of necessity is occasioned by the owner of a close parting with all the surrounding land through which he has been accustomed to approach it: it is a reservation implied by the very nature of such a grant, and must be construed, not according to the variation of circumstances after the grant, but with reference to the situation of things at the [*81]

time of the grant. It would occasion the greatest inconvenience if such a right were liable to be altered or defeated by every transfer of an intervening close. Now at the time of the feoffment in 1801, the defendant being cut off from the Arundel road by the slip he had granted out of close 6, and by the transfer of closes 2 and 3, had no means of passing from close 4 to the Arundel road, except over the lands of Duke: close 5 was in the occupation of Mrs. Falconer, and though the defendant was seised in fee of it, he would have been liable to an action if he had intruded during the continuance of her interest. [*Per Curiam*: It does not appear on the case that Mrs. Falconer had any interest,—she might have been a mere servant.] She is stated to have been in occupation, and the court will intend that an occupier has at least an interest from year to year. At all events the defendant must have passed over part of close 3, and he had no way so convenient as passing also over close 2. By necessary implication, therefore, that way must be deemed to have been reserved out of the feoffment; for where a party has a way over closes, and afterwards sells them, and has no other way so convenient, the law reserves to him the old way; whether it be by non-extinguishment or implied reservation, is immaterial; the way remains. 1 Wms. Saund. 323, n. 6. The necessity arises out of the grant, and not out of any state of facts subsequent to the grant, and therefore is not affected by any subsequent modification of property. That is the principle of the decision in *Buckby v. Coles*, *and also of *Clarke v. Cogge*, Cro. Jac. 170, and *Dutton v. Taylor*, 2 Lutw. 1487. The authority of which last case was recognised in *Bullard v. Harrison*, 4 M. & S 387, although Lord KENYON had said he could not understand it. The language of PORHAM, C. J., in *Jorden v. Atwood*, Owen, 121, is to the same effect. *Packer v. Welstead* is in principle a decision in favour of the defendant, and the dictum in *Staple v. Heydon* is applicable only to cases where there is another way to which the party may resort.

BEST, C. J. Substantially there is no difference between these two cases; in the second there is a plea of a way by prescription, but as that has been extinguished by unity of possession, the point to be decided is in effect the same in both, and the question is, whether or no the defendant is entitled to a way of necessity over the plaintiff's close. This is an action for a trespass committed in the close No. 2, to which the defendant has pleaded, that in 1801 he enfeoffed George Duke of the close in which, &c., and that at the time of the feoffment he had no way to his own close except over the close in which, &c., and was therefore entitled to a convenient and necessary way to his own close, over the close in which, &c.: so that the issue to be tried was, whether or no he had any other way? Considering that, as the question, much that has to-day been advanced in argument has no bearing upon it; because if the defendant has not made out that he had no other way, the plaintiff is entitled to judgment. But I had rather take the case on the broad ground on which it has been argued, than on this narrow ground. The plaintiff complains that the defendant has trespassed on his land; the defendant insists that he was entitled to *83] pass over it in the enjoyment of a way of necessity; all the four closes, he says, were originally his, and he was then accustomed to pass from the first unto the fourth; he parted with the two in the middle, and contends that it is still necessary for him to pass through them. On behalf of the plaintiff it is asserted, that this necessity does not exist; that at the time of the trespass he might have passed from close 4 into his own land, close 6, and thence over his own land into the high road; or that, at all events, and at all times, he might have passed out of close 3 into close 5, and so have avoided close 2, the locus in quo. My judgment will be on the latter course: if the defendant could have pursued that, and I am of opinion he could, he is entitled to no way of necessity. It has been contended that we are to look to the state of things at the time of the feoffment, and that at that time the defendant could not have

passed into close 5, because it was in the occupation of Mrs. Falconer: if so, the defendant ought to have shown in her an interest sufficient to exclude him; instead of that the case only states that she was in the occupation of close 5, a statement consistent with a mere tenancy at will, which the defendant might at any time have determined. It is clear, therefore, that he ought to have passed from close 3 into close 5, and if so, he could not claim a way of necessity over close 2. On the part of the plaintiff the case has been put on its right ground. If I have four fields, and grant away two of them, over which I have been accustomed to pass, the law will presume that I reserve a right of way to those which I retain: but what right? the same as existed before? No: the old right is extinguished, and the new way arises out of the necessity of the thing. The passage which has been cited from Serjt. *Williams's* note contains a complete answer to the argument on the part of the defendant. "A way of necessity, when the nature of it is considered, will be found to be nothing else than a way by grant;" but a grant of no more than the circumstances which raise the implication of necessity require should pass. If it were otherwise, this inconvenience might follow, that a party might retain a way over 1000 yards of another's land, when by a subsequent purchase he might reach his destination by passing over 100 yards of his own. A grant, therefore, arising out of the implication of necessity, cannot be carried farther than the necessity of the case requires, and this principle consists with all the cases which have been decided. It has been argued, that the new grant operates as a prevention of the extinguishment of the old right of way, but there is not a single case which bears out that proposition, or which does not imply the contrary. By the grant a new way is created, and that way is limited by necessity. Serjt. *Williams* says, "where a man having a close surrounded with his own land grants the close to another, the grantee shall have a way to the close over the grantor's land, as incident to the grant; for without it he cannot derive any benefit from the grant. So it is where he grants the land, and reserves the close to himself." What way is it the grantee shall have? not the old, but a new way, limited by the necessity. The case of *Buckby v. Coles* is not very clearly reported, and I do not altogether understand it; but in *Clarke v. Cogge* the court says, that "although the grantor in such a case reserve not a way, it shall be reserved for him by law;" that is, not the old way, but a new one of necessity, if he hath not any other way. In *Jorden v. Atwood*, POFHAM, C. J., says, that "if a man had three fields adjoining, and makes a feoffment of the middle field, the feoffee shall have a way (not the way) to this through the other close." Then in *Packer v. Welstead*, it was expressly found that the party had not any other way, but in the present case there might be a sufficient way reserved, although the defendant should never pass over close 2. The claim, therefore, to a way of necessity is completely answered, and as for a way by prescription, it cannot for a moment be doubted that such a way was extinguished by unity of possession. I think, therefore, that on the present occasion our judgment must be for the plaintiff. [*84]

PARK, J. On the former argument, DALLAS, C. J., and the rest of the court, were satisfied that the plaintiff was entitled to judgment, but granted a second argument at the instigation of the defendant's counsel. I am still of the same opinion, and that, from what appears on the face of the plea. The defendant states that he had no other way at the time of the feoffment; but that assertion has not been made out in proof; and from all the authorities referred to, it is clear, that when a way is claimed of necessity, it is a good answer to show that there is another way which the party may use. [*85]

BURROUGH, J. The defendant's case is disposed of by the facts which have come out. The lease to Duke ended in 1807, long before the time of the trespass complained of; at that time there was no impediment to the defendant's reaching the Arundel Road by passing over his own land, unless it were Mrs.

Falconer's occupation; but we are no where informed what the nature of her interest was, and may therefore presume the defendant might have passed over land of which he owned the fee. Upon the former argument it was contended, that the only necessity which could support the defendant's plea, must be a necessity continuing up to the time of the trespass justified under it: in this I entirely agree, and am therefore satisfied our judgment must be for the plaintiff. Judgment for plaintiff accordingly.

*86] *JOHNSON v. LAWSON and Another, in Replevin.

Declarations of servants and intimate acquaintances are not admissible evidence in questions of pedigree.

THIS cause was tried at the Kent Summer assizes, 1823, before GRAHAM, B.

The question for the jury was, whether one Francis Lidgbird (whose claim the plaintiff supported) or Henry Wilding (whose claim the defendant supported) was heir at law to Henry Lidgbird, who died seised of certain lands in October, 1820, and was the son of John Lidgbird, formerly sheriff of Kent.

In consequence of a separation having taken place between John the sheriff and his wife, their son Henry was brought up, from about the age of nine months, with Miss Weller, afterwards Mrs. Hollinworth, till he went to college, and he spent his vacations at Mrs. Hollinworth's house: John Lidgbird, the sheriff, was on the point of marriage with Mrs. Hollinworth (which was prevented by his son Henry,) and after the death of John, Henry lived with Mrs. Hollinworth for twenty-three or twenty-four years, and she was the only person in his confidence; this was proved by Mrs. Lucretia Pakenham, niece of Mrs. Hollinworth, who had died before the trial.

On the part of the plaintiff it was proposed, among other evidence, to give evidence of declarations made by Mrs. Hollinworth, as to Francis Lidgbird being the heir of Henry, who died seised; but the learned judge refused to receive such evidence.

It was then proved by Mrs. Elizabeth Withers, that a Mrs. King had been Henry Lidgbird's housekeeper for twenty-four years, and it was proposed to give evidence of declarations by Mrs. King, who was no longer living, as to Francis Lidgbird being the heir to Henry, but this *87] was objected to by defendant's counsel: and Mr. Baron GRAHAM rejected it, saying "that it seemed to him to be carrying the principle of hearsay evidence too far; DR GREY, C. J., having laid it down, that it must be confined to persons who are members of the family."

Another witness, Mrs. Sophia Ridley, was also called, to give similar proof of declarations by Mrs. Hollinworth and Mrs. King, but was also rejected.

A verdict having been found for the defendants, *Peake*, Serjt., obtained a rule nisi for a new trial, against which *Taddy*, Serjt., was to have shown cause; but the court called on *Peake* to support his rule.

In questions concerning pedigree the declarations of persons related to the family have always been received in evidence, upon the ground, that men are supposed to take an interest in knowing the number and particulars of their kindred. But upon this principle it will be most expedient to admit, and most unjust to exclude the declarations of persons who have long lived in a family as respected and confidential servants, or as intimate acquaintance. It is obvious that such persons must have a more lively interest in, and from frequent conversation a more accurate knowledge of the concerns of the family, than a distant relation, who may never have conversed with any of the parties concerned; and yet the declarations of such distant relation would be admitted without scruple. No case has been reported in which the declarations of servants have been excluded; and in *Beer v. Ward*, (a) ABBOTT, C. J., admitted the declara-

(a) Not yet reported.

tions of a deceased steward, housekeeper, and gamekeeper. [*Per Curiam*. It appears he thought the authorities were against the admission of such evidence, and that he received it subject to future discussion.]

*The declarations of a husband have been received with regard to the kindred of his wife; and in *Vowles v. Young*, 13 Ves. 146, and *White-locke v. Baker*, 13 Ves. 514, the arguments of the lord chancellor only go to the exclusion of entire strangers. BULLER, J., in *Rex v. Eriswell*, 3 T. R. 719, says, that declarations of persons not of the family may be received, and he refers to *Brown v. Shelly*, Easter, 1776. [BURROUGH, J. I went the same circuit as BULLER, J., and I never knew such evidence admitted.] In the same case, Lord KENYON, though he does not speak so positively, says that perhaps the declarations of persons who lived in intimacy with the family are receivable. The principle on which the declarations of a husband are admitted applies equally to the case of an old servant. The husband can only know the particulars of his wife's family from his intimate connexion with her; and a confidential servant has equal opportunities of learning the state of his master's family.

In *Roe dem. Bushell v. Gore*, at Lancaster Summer assizes, 1763, PERKINS, B., received the declarations of an acquaintance, and said, that the declarations of servants were often admitted; and according to a MS. note of *Brown v. Shelly*, a person was called to give evidence of what he had heard a deceased physician report, as the declarations of a deceased relation. [BEST, C. J. That was hearsay two deep, and never could have been evidence: there must have been some misapprehension in the reporter.] The general rule is to exclude strangers, but a confidential servant cannot be esteemed a stranger for this purpose.

BEST, C. J. This is a question of great importance, and if I felt any doubt I should desire another argument; but, as it is dangerous to express doubt where none is *entertained, I shall at once pronounce my opinion. As a general rule, hearsay is not admissible evidence, but to this general rule pedigree-causes form an exception, from the very nature of the case. Facts must be spoken of which took place many years before the trial, and of these, traditional evidence is often the only evidence which can be obtained; but evidence of that kind must be subject to limitation, otherwise it would be a source of great uncertainty, and the limitation hitherto pursued, namely, the confining such evidence to the declarations of relations of the family affords a rule at once certain and intelligible. If the admissibility of such evidence were not so restrained, we should, on every occasion, before the testimony could be admitted, have to enter upon a long inquiry as to the degree of intimacy or confidence that subsisted between the party and the deceased declarant. In *Beer v. Ward*, Lord Chief Justice ABBOTT seems to have doubted at first, influenced perhaps by a recollection of the dicta in the Chancery cases, yet he afterwards acceded to the authority of the decisions which have confined the declarations admissible to those of deceased relations: it is true, he admitted the declarations of the servants, but this was subject to further discussion, and to avoid the possibility of incurring further expense. If we look into the cases, we shall find that the rule has always been confined to the declarations of kindred. In *Goodright d. Stephens v. Moss*, no one can read the judgment of Lord MANSFIELD, and say that the admissibility of such declarations is to depend upon the degree of intimacy in the party making them. Lord MANSFIELD says, "An entry in a father's family bible, an inscription on a tombstone, are good evidence. So the declarations of parents in their lifetime." ASTON, J., says, "rejecting the general declarations of the father and mother was wrong." It is clear, that neither of these judges supposed the practice *to extend beyond admitting the declarations of members of the family. As to the two cases in Chancery, the question in the first was, whether the declarations

of a man who had married into a family were admissible. Now, such a question would never have been discussed if there had been any such practice as receiving the declarations of ordinary acquaintances; and though the expressions of the chancellor may seem to go beyond, he decided only on the ground that the declarations of a husband might be received. The evidence there, indeed, might perhaps have been rejected on other grounds, inasmuch as the witness had a strong bias in favour of the legitimacy he was called on to establish. In the second case Lord ELDON only says, "I accede to the doctrine of Lord MANSFIELD as it has been stated from Cowper, but it must be understood as it has been practised and acted upon."

What then has been the practice? to limit the admissibility to declarations of members of the family. It is true, a different opinion was expressed by a most learned judge in *Rex v. Eriswell*. But that judge must have been misled into the opinion by the manuscript case which has been cited; that case, however, must be untenable at all events, because, though declarations of members of the family may be received, it is impossible to say, that in any shape declarations of acquaintances, as to declarations of members of the family can ever be admissible. But it does not appear that any objection was made at the time; and that circumstance at once disposes of the authority of the case. As to the *Nisi Prius* case at Lancaster, I wish such cases were never cited. It is not right to repeat opinions hastily formed and delivered in the hurry of trial, and the practice of referring to them has occasioned all the confusion that the enemies of our law object to. That decision probably conduced to mislead

*91] Mr. Justice BULLER, for in his own statement of the case of *"the Duke of Athol v. Lord Ashburnham*, Bull N. P. 295, he speaks only of the declarations of a brother or other near relation: it is not wonderful that Lord KENTON should speak with some hesitation on the point, after Mr. Justice BULLER had spoken so decidedly. The practice of receiving declarations in evidence is an exception from our general rules; it has been carried as far as it can with safety, and we must not extend it farther.

PARK, J. I am of the same opinion. The court had great difficulty in granting the present rule, and after looking into the cases, I am satisfied that it ought to be discharged. Neither Lord ERSKINE in *Vowles v. Young*, nor Lord ELDON in *White Locke v. Baker*, lay down the rule to the extent to which we are now called on to carry it. *Vowles v. Young* was the first case in which the exception was carried so far as to admit the declaration of a person connected only by marriage; and when Lord ERSKINE gives his deliberate judgment on the 26th of November, he says, "The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out."—"Therefore the opinion of the neighbourhood of what passed among acquaintance will not do." Lord ELDON is so anxious to guard the rule, that he makes observations upon Lord MANSFIELD's judgment, and puts a qualification lest the principle should be extended to such a case as this. "It was not the opinion of Lord MANSFIELD or of any judge, that tradition generally is evidence even of pedigree. The tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely from their domestic habits and connections that they are speaking the truth, and they could not be mistaken." It has been urged that "great confi-

*92] dence is often reposed in servants, but it is not confidence of this kind, nor is it usual for a man to confer with his domestics on the situation of the various members of his family. My objection to the proposed evidence is, that if it were to be admitted the practice would be so loose as to occasion great inconvenience; whereas, if the rule be confined to members of a family, the path to be pursued is clear and certain. I think, therefore, we ought to adhere to the old rule, and not admit any thing so vague as that which is now proposed.

BURROUGH, J. I was engaged in the case of *Vowles v. Young*, and we objected to the declarations of the husband, that they were made after the death of his wife, when he was no longer connected with her family; but they were received, on the ground that his knowledge must have been acquired while he was yet connected. This exception from the general rule, that hearsay shall not be admitted, must be construed strictly, and the natural limits of it are the declarations of members of the family. If we go beyond, where are we to stop? Is the declaration of a groom to be admitted? of a steward? of a chambermaid? of a nurse? may it be admitted if made a week after they have joined the family? and if not, at what time after? We should have to try in every case the life and habits of the party who made the declaration, and on account of this uncertainty such evidence must be excluded. The argument for the defendant rests on here and there a loose expression from a judge, and on the circumstance that there is no case in which such evidence is reported to have been excluded; but before we can admit it, we must be referred to some case to warrant its admission. We have heard of no such case, and therefore the present rule must be

Discharged.

*RECOVERY.

[*93]

Amendment: what evidence sufficient to justify the alteration of a parish in a recovery, where a wrong parish was inserted in the deed to lead the uses.

IN the deed to lead the uses, the land was described as so many acres, purchased of Jonas Koe, and in the occupation of Thomas Rix, in the parish of Stepney.

Bosanquet, Serjt., moved to amend the recovery by substituting Whitechapel for Stepney, upon affidavit that the property so described was actually in the parish of Whitechapel; that, in a settlement in tail made in 1776, it had been described precisely in the same manner, in the particulars of number of acres, vendor, and occupier, and correctly as to the parish; and that the premises had ever since been enjoyed consistently with the deed. He referred to *Lambe*, plaintiff, *Beaston*, deforciant, 5 Taunt. 207, to show that the court would permit such an amendment where there was sufficient evidence to satisfy them of the identity of the property in question.

The Court held that the evidence adduced was sufficient, and permitted the amendment.

Fiat.

*DYER, Clerk, v. BOWLEY.

[*94]

IN 1796, H. demised to S. for sixty-eight years, premises which in 1793 had been mortgaged to F. S. assigned to N., who underlet to D. In 1818, H. conveyed the premises in fee to R. N., who was also agent of H., paid the interest on the mortgage to F. from 1816 to 1820 to the amount of the rent reserved. R. distrained for rent in 1820: *Held*, that D., who replevied at the instigation of N., might, under the plea of *riens in arriere*, avail himself of these payments.

THIS was an action of replevin, and the declaration stated, that on the 2d of June, 1820, the defendant took the goods and chattels of the plaintiff, in a certain dwelling-house, situate in the parish of St. Mary-le-bone, in the county of Middlesex, and unjustly detained the same, against sureties and pledges, until, &c.

The defendant pleaded four cognisances; first, as bailiff to Messrs. Ramsbottom the elder, John Newman, John Ramsbottom the younger, and Nicholas Graham, for one year and three quarters' rent, due the 25th of March, 1820, in respect of the said dwelling-house, in which, &c., which the plaintiff held and enjoyed, as tenant to them, by virtue of a certain demise thereof theretofore

made, at the yearly rent of 6*l.*, payable quarterly; and because 10*l.* of the aforesaid rent was due, defendant, as their bailiff, distrained, &c. Second cognisance, like the first, only stating the rent to be 40*l.* instead of 6*l.*

The third cognisance was like the first, only stating that one Jonathan Saul was tenant to Ramsbottom and Co. instead of plaintiff; and the last cognisance stated, that James Northwood was tenant to Ramsbottom and Co. instead of plaintiff.

Pleas in bar to such cognisances, first, non-tenuit; secondly, riens en arriere, upon which issue was joined.

The cause came on to be tried at the sittings after Michaelmas term, 1821, at Westminster-hall, before DALLAS, C. J., when a verdict was found for the plaintiff, damages 4*l.* 4*s.*, subject to the opinion of the court

*95] Upon a long case, no part of which ultimately bore upon the argument or judgment of the court, but the following facts.

The premises, in respect of which the defendant distrained for rent, had been mortgaged in 1793 to Lord Shuldham, and by divers mesne conveyances, the mortgage afterwards came to the directors of the Sun Fire-office, in whom it was vested at the time of the distress, the mortgage never having been redeemed.

In 1796 John Harcourt demised the premises to Jonathan Saul, for a term of sixty-eight years, at a yearly rent of 6*l.*, payable quarterly. In 1808 Saul assigned his term to James Northwood, who underlet the premises to the plaintiff. In 1816 Harcourt appointed Charles Ranken receiver of the property conveyed to the Sun Fire-office. In 1818 Harcourt conveyed the premises in fee to Ramsbottom and Co., under whom the defendant made cognisance. In 1819, the Sun Fire-office gave the plaintiff notice not to pay rent to any person but the attorneys of the Sun Fire-office.

Northwood, who indemnified the plaintiff, and claimed the premises as the assignee of Saul, had paid the rent of the premises to Harcourt; but at the time of the distress, and for twenty-five years previous, he had been Harcourt's general and authorized agent for all his landed property, and had paid interest on the mortgage to the Sun Fire-office from 1816 to April, 1820. (It did not appear on the case, but seems to have been taken for granted, that the interest thus paid equalled or exceeded in amount the rent now claimed.)

If the court should be of opinion that the plaintiff was entitled to recover, then the verdict for 4*l.* 4*s.* damages was to stand; but if otherwise, then a verdict was to be entered for the defendant, with 10*l.* 10*s.* damages, instead of the re-
*96] turn, the jury having found that the *arrears of rent amounted to that sum, and that the goods distrained were of that value.

This case was argued twice; in Easter term, 1823, and again this day, when

The court called on *Bosanquet*, Serjt., who was for the defendant, to confine himself to the point, whether or no the payment of interest by Northwood, as agent, and therefore with the consent of Harcourt, did not operate as a discharge on the plea of riens en arrear.

It was then urged, that this rent was paid with Harcourt's money, by Northwood, in his capacity of agent to Harcourt, and not as lessee of the premises. [Barr. C. J. But he was lessee as well as agent, and the payment having been acquiesced in so long, must be presumed to have been made with the assent of Harcourt.] The money paid to the Sun Fire-office was interest on a debt, and not rent; it was money due from Harcourt, which he alone was bound to pay, and therefore cannot avail the plaintiff on a plea of riens en arriere, as against the Ramsbottoms, who were the persons legally invested with the reversion on Northwood's term,—entitled to rent from the lessee,—and who never gave any authority for the payment of this interest out of the rent. [Barr. C. J. The plaintiff never acknowledged the Ramsbottoms as landlord; they therefore cannot stand in a better situation than Harcourt.] But there was no agreement for the lessee to pay this interest on behalf of his lessor; and ir

the absence of any such agreement, he cannot be allowed to dispute his lessor's claim to rent. No assent to the payment of the interest by the lessee out of the rent can be collected from the case; and the statement that Northwood acted as agent seems to rebut any such presumption.

*BEST, C. J. We certainly shall not overrule the decision we have pronounced this term in *Alchorne v. Gomme*, ante, 54, nor allow a tenant to dispute the title of his landlord; but what is this case? The defendant makes four cognisances, and acknowledges the taking of the plaintiff's goods for rent due from the plaintiff as tenant to Ramsbottom and Co.; for rent due from Saul, as their tenant; and from Northwood, as their tenant; to which the plaintiff answers, first, I do not hold of Ramsbottoms; and, secondly, if I do, there is no rent due from me. One fact is most material; the interest of Ramsbottom and Co. has never been acknowledged by either party; they therefore only stand in the situation of Harcourt; and if what has been done amounts to payment to Harcourt, it is also payment to Ramsbottom and Co. Does this transaction, then, amount to payment of rent to Harcourt? It is true the jury have not found it so, but they have submitted the facts to us, and we are to draw the proper inference from them. It is stated as a fact, that from 1816 to 1820, Northwood paid to the Sun Fire-office the interest due upon the mortgage, and that during all this time no objection was made to the payment; must it not, therefore, be presumed to have been paid with the landlord's assent? It is contended, that it was paid with Harcourt's money: there is nothing in the case to show that: the case states that Northwood was Harcourt's agent:—but he was also his lessee; and supposing the interest to have been paid by the lessee with the assent of Harcourt, there is no rent due to him. If there is no rent due to Harcourt, there is none due to those who stand in his place. The conveyance to them took place in 1818, and the payment of interest continued two years afterwards without any objection on their part; they therefore must be deemed to have been satisfied with that payment. It has been urged, that Harcourt alone was responsible for the payment of this interest, and that it ought not to affect the Ramsbottoms' claim for rent. I cannot see that. If I purchase an estate charged with a mortgage, I purchase it subject to the incumbrance, and must be prepared to defray the claim; so that the Ramsbottoms are not injured by this decision; they have such interest in the property as Harcourt could convey, and if they had received the rent in dispute must have paid it again in the shape of interest to the Sun Fire-office. At all events, upon the facts of this case, they must be taken to have assented to the payment, and therefore the plaintiff is entitled to judgment, upon the plea of *riens in arrear*.

PARK, J. The simple question for us to decide is, whether the plea of *riens in arrear* is not supported by the statement of facts in this case. And I think we must presume, that the payment of the interest in question was made with the assent of the landlord; so that in coming to this conclusion we violate no rule of law; we do not say, that the tenant may pay his landlord's debt without any assent, but only, that if a demand in respect of interest on a mortgage be paid with his assent, that is equivalent to payment of so much rent, and though the tenant cannot plead a set-off, he may avail himself of the payment under the plea of *riens in arrear*. In *Taylor v. Zamira*, 6 Taunt. 524, the same thing was permitted in respect of a payment of ground-rent, and we therefore think the plaintiff entitled to judgment.

BURROUGH, J., concurring.

Judgment was given for the plaintiff on the plea of *riens in arrear*.

*99] *RAWSON and Another, Assignees of WILKINSON, a Bankrupt,
v. HAIGH and Others.

On the 3d of July, W., who had appointed to meet L. respecting some accounts in which W. was interested, broke his appointment, and departed for France, leaving for L. a letter, in which he said, "I shall be back, I hope, in ten days; in the mean time *I shall make proposals to your son's creditors.*—I will write to B. and S., so *do not feel uneasy about them, or any of your son's friends.*"

On the next day, he wrote to L. a letter from Calais, in which he said, "If you could accompany my brother, you would contribute *to get the business settled a moment the sooner;*" and on the 2d of August he wrote from Paris, saying, "As some of B. L.'s (L.'s son's) creditors have threatened to make me solely responsible, I am under the necessity of remaining in France."

Held, that these letters were admissible in evidence and sufficient to establish an act of bankruptcy, by showing with what intention W. departed the realm.

In this cause, which was tried at the Guildhall sittings, after Hilary term last, before Lord GIFFORD, C. J., the plaintiff's evidence was commenced by putting in the commission of bankrupt and proceedings against Richard Wilkinson. The trading was thereby substantiated, but the proof of the act of bankruptcy was, as contended by the defendant's counsel, insufficient, and his lordship reserved that point, with liberty for the defendants to move for a non-suit thereon.

The commission of bankrupt bore date the 6th of September, 1822.

The deposition of the act of bankruptcy was dated the 17th September, 1822, and was made by William Llewellyn. After setting out the examinant's knowledge of the bankrupt, and proving his trading for the space of four years immediately antecedent to the commission, it stated that on or about the second of July, 1822, Wilkinson had a meeting with the examinant relative to some accounts in which Wilkinson had, as examinant understood and believed, an interest, and at such meeting an appointment was made for the following morning at eleven o'clock, when the accounts were to be produced, *and the business relating thereto to be finished. That on the morning of the 3d of July examinant went to Wilkinson's lodgings, where the appointment was to be kept, when, instead of meeting with Wilkinson, examinant received from Wilkinson's brother a note, (marked B,) and two or three days after, examinant received from Wilkinson a letter (marked C.) The examinant then deposed to the signature of Wilkinson to the letter (marked A,) and concluded with stating his belief, that Wilkinson did not attend to the appointment in consequence of his apprehension that a writ had been or was about to be issued against him.

The note marked B was from Wilkinson to Llewellyn, and after alluding to Wilkinson's *sudden departure*, proceeded, "a letter from Paris, on urgent business is the cause. I shall be back, I hope, in ten days: in the mean time *I shall make proposals to your son's creditors*, and trust on my return to find all settled;" and then in a postscript, "I will write immediately to Messrs. R. and S. at Bristol, so *do not feel uneasy about them* or any of your son's friends; my brother will deliver you your account current with your son."

The letter marked C was also from R. Wilkinson to Llewellyn, dated Calais, 4th July, 1822, and was as follows: "My brother will show the letters I have written from Bristol and Yorkshire:—I hope you will approve of them. If you could accompany him in the rounds which he is going to make, *you would contribute to get the business settled a moment the sooner, and then your account current can be arranged in two hours between us.* I am so much tired with writing that I can hardly keep my head up, so you must excuse brevity, particularly as I have to go off to-night for Paris."

The letter marked A was from R. Wilkinson, dated Paris, the 2d of August, 1822, addressed to Messrs. *W. and J. B. Sedgwick, and the following extract alone bore on this case: "as some of Mr. W. B. Llewel-

lyn's creditors have threatened to make me solely responsible, I am under the necessity of remaining in France, apprehensive that some lawsuit, or even arrest, may be instituted against me, and *which would ruin all my hopes and expectations* for hereafter; I therefore feel myself under the necessity of requesting of them all a declaration, that no arrest or lawsuit shall be put in force against me; and I trust, gentlemen, you will have no objection to grant me the same, being perfectly convinced that a personal interview will do more towards the settling of Mr. Llewellyn's concerns than can be done by correspondence."

The act of bankruptcy relied on, was the departing the realm with intent to defraud or delay creditors. A verdict having been found for the plaintiffs,

Vaughan, Serjt., obtained a rule nisi to set it aside, and enter a nonsuit instead; and being now called on to support his rule, he contended, first, that the expressions in the two first letters were so vague and general that it was impossible to collect from them any indication of an intention to delay or defraud creditors. Secondly, that the letters from Calais and Paris were not admissible in evidence. A bankrupt is not a competent witness to support his own commission; *Field v. Curtis*, 2 Str. 829; *Wyatt v. Wilkinson*, 5 Esp. 187. Nor are his declarations admissible for such a purpose, when made subsequently to the act which it is proposed to establish. *Robson v. Kemp*, 4 Esp. 233; *Watts v. Thorpe*, 1 Campb. 376; *Marsh v. Meager*, 1 Starkie, 353. The act of bankruptcy relied on in the present case, was *departing the realm; [*102 letters, therefore, written after the party was out of the realm, were subsequent to the act, and formed no part of the *res gestæ*. If a letter written like that from Paris, a month after the party left England, can be admitted, it is impossible to draw any line as to the period after which his declaration shall be excluded. Hitherto the period has been defined by admitting only such declarations as accompanied the act of bankruptcy; but it does not appear that Wilkinson left the realm to defraud or hinder his creditors, and if he did not depart with that view, his afterwards staying abroad with that view would not of itself be an act of bankruptcy.

BEST, C. J. It appears from the learned judge's report to have been left to the jury to determine whether or no Wilkinson had committed an act of bankruptcy; if so, the only point for us to determine is, whether evidence was adduced of such an act. The words of the statute, 13 Eliz. c. 7, s. 1, are, "If any merchant—shall depart the realm—or otherwise—absent himself—to the intent or purpose to defraud or hinder any of his creditors—he shall be reputed, deemed, and taken for a bankrupt." It is not necessary for us to decide, whether, if a party leaves the realm with one purpose, and afterwards stays away with another, namely, to defraud his creditors, such a staying away would be an act of bankruptcy, because, upon the evidence before us, I am clearly of opinion that Wilkinson departed the realm with intent to hinder his creditors. In the letter of the 3d of July, which he left at his lodgings at the time of his departure, and which was addressed to a person who had had a meeting with him relative to some accounts in which he was interested, after speaking *of his sudden absence, he says, "In the mean time I shall make proposals to your son's creditors," and "I will write immediately to Messrs. [*103 R. and S., so do not feel uneasy about them, or any of your son's friends:" Was not this letter of itself sufficient to raise suspicion? But in a letter dated the very next day from Calais, he says, "If you could accompany my brother in the rounds which he is going to make, you would contribute to get the business settled a moment the sooner, and then your account current can be arranged in two hours between us." Does not this letter show that he was embarrassed in his affairs, and that he departed because he apprehended his creditors would act hostilely? Then comes the third letter from Paris, in which he says, "As some of Mr. W. B. Llewellyn's creditors have threatened to make me solely responsible, I am under the necessity of remaining in France." Now, when

these letters are coupled with the fact of his running away in a hurry, would not a jury be warranted in finding that he went to avoid his creditors? If so, there has been a clear act of bankruptcy. But it has been urged, that the second and third letters having been written subsequently to the act of departing the realm, were not admissible in evidence: I am clear that they were admissible. The going abroad was of itself an equivocal act, and where an act is equivocal, we must get at the motive with which it was committed. In ninety-nine cases out of a hundred, this can only be got at by the declarations of the party himself. The present, therefore, is an exception to the rule which says, that a party shall not make himself a bankrupt by his own declarations. It is true, this exception must be taken subject to limitations;—a line must be drawn;—and it is clear that a party must not be enabled to avail himself of declarations made at a time long subsequent to the *104] act in question. *The declarations, in order to be admissible, must be made, or the letters written, at the time of the act in question; but it is sufficient if they are written at any time during the continuance of the act; the departing the realm is a continuing act, and these letters were written during its continuance. If there was an intention to hinder creditors, it is not necessary that they should actually have been hindered, or even have called and been denied. The jury, therefore, were warranted in the finding they have come to, and the present rule must be discharged.

PARK, J. I do not enter into the question, whether the act of merely departing the realm is, unexplained, an act of bankruptcy; but I am satisfied that declarations made during departure and absence are admissible in evidence to show the motive of the departure. It is impossible to tie down to time the rule as to the declarations: we must judge from all the circumstances of the case: we need not go the length of saying, that a declaration made a month after the fact would of itself be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form part of the whole *res gestæ*. I was present at the trial of *Bateman v. Bailey*, 5 T. R. 512, and the learned judge who presided thought that declarations made subsequently to the act were within the rule which excludes the bankrupt from proving his own act of bankruptcy: but the Court of King's Bench held otherwise, and sent the case down for a new trial, because there might be no other means of getting at the motives which occasioned the act in question. The declarations, however, *105] must be connected with the state of the party's mind at *the time, and in the present instance I think the connection sufficiently clear for the admission of the letters.

BURROUGH, J. I was a commissioner of bankrupts many years, and I should have had no doubt on letters such as these.

Rule discharged.

CHARLES TUFTON BLICKE v. JOHN DYMOKE, Clerk.

Where defendant, and L. D. (who was tenant for life of an estate, with remainders over in tail to the first and other sons of L. D. and of defendant,) conveyed an estate in fee, and covenanted that the first son of L. D. who should come of age, or such other person as should become competent to complete a title to the premises, should, upon the request of the purchaser or his heirs, by recovery, fine, or other assurance as counsel should advise, effectually convey the premises to plaintiff; the purchaser having died, and his heir having requested defendant to cause his eldest son, then of age, to suffer a recovery, and the defendant having refused, and these facts being alleged in the declaration, *Held*, that it was not necessary, in a declaration on this covenant by the heir of the purchaser, to allege that the defendant had notice of such heir having become entitled to the property; nor that counsel had advised a recovery to be suffered; nor that plaintiff had offered to make a tenant to the precept.

PLAINTIFF declared against defendant in covenant on a deed between Lewis Dymoke, Esquire, champion of England, of the first part, the defendant of the

second part, and Charles Blicke, since deceased, of the third part; by which, after reciting that under the will of J. Dymoke, deceased, divers estates, including the messuage thereafter mentioned, stood limited to the use of L. Dymoke for life, with remainder to the use of trustees in trust to preserve contingent remainders, with remainder to the first and other son and sons of L. Dymoke in tail male, with remainder to the use of the defendant for life, with remainder to the use of *trustees to preserve contingent remainders, with remainder [*106 to defendant's first and other son and sons in tail male, with divers remainders over; they, the said L. Dymoke and the defendant, by bargain and sale, conveyed to the plaintiff, No. 229, in the Strand, to have and to hold the same unto the plaintiff, his heirs and assigns, during the natural lives of L. D. and the defendant, and the life of the survivor of them, and during all the other estates and interests of them or either of them therein: and L. D. for himself, his heirs, executors, and administrators, and for and on behalf of his first and other son and sons, and the defendant for himself, his heirs, executors, and administrators, and for and on behalf his first and other son and sons, did thereby severally and and respectively, and not jointly, covenant, promise, and agree to and with Charles Blicke, since deceased, his heirs and assigns, in manner following; that is to say, that they, the said L. D. and the defendant, or one of them, had power to convey; and also that the first son or other heir male of the body of L. D. who should first attain the age of twenty-one, or in default of such first son or other heir male of L. D. attaining such age, the first son or other heir male of the body of the defendant first attaining the age of twenty-one years, or such other person or persons as under the uses of the will or otherwise should first become legally competent by common recovery or otherwise to complete a good title to the fee-simple of the said messuage or tenement and premises, should and would, upon the request of Charles Blicke, since deceased, his heirs or assigns, but at the proper costs of L. D. and the defendant, by such common recovery, fine or fines, and other assurances as counsel should advise, well and effectually convey and assure the said messuage or tenement and premises, or the reversion and inheritance in fee-simple thereof, unto and to the use of Charles Blicke, his heirs and assigns for ever, or otherwise as his or their counsel should *direct. There was also a covenant to make, upon [*107 every reasonable request, and at Charles Blicke's cost, all such further assurances as by Charles Blicke or his counsel should be reasonably advised, devised, or required. Averment of the seisin of Charles Blicke, his death, and the consequent seisin of the plaintiff as his heir; and also of the death of L. D. without heir male; and that Henry Dymoke, being the first son of the defendant who attained twenty-one, came of age in March, 1822, whereupon the plaintiff requested the defendant, together with H. D., to suffer a common recovery of the said messuage to the use of the plaintiff and his heirs. Breach, that defendant did not, when he was so requested as aforesaid, or at any other time, together with H. D., suffer and cause H. D. to suffer a common recovery, so and in such manner as in that behalf aforesaid, but refused so to do. Further averment, that the plaintiff did request the defendant to cause H. D. by a common recovery, as by counsel then and there in that behalf was advised, to convey and assure the said messuage in fee-simple unto and to the use of the plaintiff, his heirs and assigns for ever. Breach, that the defendant did not, when he was so requested, or before or since, well and effectually convey and assure the messuage and premises in manner in that behalf aforesaid, or in any other manner, but neglected and refused so to do. Demurrer and joinder.

Taddy, Serjt., in support of the demurrer. The defendant covenants that his first son shall suffer a recovery upon request: the plaintiff, therefore, ought to have averred a request to the defendant's son, as he alone was competent to suffer a sufficient recovery. Secondly, it was incumbent on the plaintiff to take the first step, and by giving the name of a demandant and tenant, to put the

defendant in a condition to perform his covenant. Moore, 810. Bac. Abr. *108] *Condit.* 673. And the old *law went much farther. Vin. Abr. *Condit.* Y. c. U. c.; *Palmer's case*, 5 Rep. 25; Hutton, 48. Thirdly, as the defendant covenants to complete the title by such common recovery and other assurances as counsel should advise, there ought to have been an averment of what counsel had advised, and of notice to defendant of plaintiff's title. *Stagford v. Bottorne*, Cro. Eliz. 298.

Bosanquet, Serjt., contra. Notice was not necessary. *Reynolds v. Davies*, 1 B. & P. 625; *Skip v. Hook*, Com. Rep. 562; *Bristow v. Bristowe*, Godb. 161; *Hingen v. Payn*, Cro. Jac. 475. But even if notice were necessary, it is implied in the averment of a request to perform the covenant. Vin. Abr. *Condit.* A. D. Com. Dig. *Condit.* L. 9; Pleader, 75, where the cases are collected in great numbers, as *Fletcher v. Pynfett*, Cro. Jac. 102; *Berisford v. Woodroff*, Cro. Jac. 404; *Crane v. Crampton*, Cro. Car. 35; *Alfrey v. Blackmore*, 3 Bulstr. 326; *Anon.*, Poph. 136. Some of these, it is true, were cases of bond, or after verdict; but the judgment of the court did not proceed on those grounds. In *Alfrey v. Blackmore*, WHITLOCK, J., says, "the sole point considerable here is, whether the notice be any part of the promise; as to this, nothing can be the substantial part of the assumpsit but that which is contained in the declaration; request is to be made to him to have him by this to take notice that the marriage is past, so that the request and notice is all one, and no cause there is to express any notice to be given to him, the request being a sufficient notice of itself, and clearly no notice ought to be here laid in the declaration." The case in Godbolt does not appear to have been after verdict; but even if it were, Lord COKE held, "that there needed not any notice, because there was not any penalty in the case."

*109] The court stopped *Bosanquet* as to the other points.

Taddy. *Reynolds v. Davies* and *Skip v. Hook*, which were cases on bills of exchange, do not apply, because a party liable on a bill is bound to take notice of the extent of his own liability. In the cases after verdict, the court would imply that notice, if necessary, had been given; but no implication can be made on a demurrer. The rest of the cases cited were decisions on bonds, which, like the cases on promissory notes, stand altogether on a footing different from that of the present, because an obligor is bound at his peril to take notice of the responsibility he has incurred, and to exempt himself from it, if he can, by pleading.

BEST, C. J. This is an action against John Dymoke, clerk, for breach of covenant, and it is material for us to look at the particular terms of the covenant, and of the breach assigned. It appears that Charles Blicke, the ancestor of the plaintiff, purchased a house in the Strand, of which the late champion of England, Lewis Dymoke, was tenant for life, with several remainders over in tail. It is clear, therefore, that Blicke having purchased the fee, could not obtain a complete title without the aid of a recovery. It appears also in the pleadings, that whether or not there were children of Lewis Dymoke in existence, Henry Dymoke the son of the defendant was a minor, so that, at that time, he could not suffer an effectual recovery. Such being the situation of the parties, what is the covenant in question, "That the first son, or other heir male of the body of Lewis Dymoke who should first attain the age of twenty-one years, or such other person as should first become legally competent to complete a good title to the fee-simple, should, at the request of Charles Blicke, his heirs or assigns, by such common recovery, fine or fines, and other assurances as counsel should advise, effectually *convey the premises in fee-simple to Charles Blicke, his heirs and assigns." There is an averment, that Lewis Dymoke died without issue; that Henry Dymoke, eldest son of the defendant, came of age in 1822; and that the plaintiff requested the defendant,

together with Henry Dymoke, to suffer a recovery of the premises to the use of the plaintiff, and then the breach assigned is, "That the defendant did not, when he was so requested, or at any other time, together with Henry Dymoke, suffer and cause Henry Dymoke to suffer a recovery to the use of the plaintiff, but refused so to do." It appears, therefore, that he was to cause a recovery to be suffered at all events, and to convey by such other assurances as counsel should advise; that he was requested to cause the recovery to be suffered, and that he refused to do so.

To this declaration several objections have been made, but the only one that appeared to me material was, that there is no allegation of the defendant's having received notice that the title to the premises had devolved upon the plaintiff.

I confess that, unassisted by the light of former ages, I should have thought a perfect stranger to the defendant ought to have given him notice that he was become possessed of such an interest in the property as would authorize him to call upon the defendant for the performance of his covenant; but by a series of cases it has been decided, that it is not necessary to show any such notice, and in two of the cases, the reason assigned is this, that giving notice is no part of the promise; by which I understand, that it is only necessary for the plaintiff to show all that brings him within the covenant; any grounds of exemption must be shown by the covenantor; and that this is so, appears from the decisions both in the King's Bench and Common Pleas. It has been urged that these decisions were after verdict; but that was not the ground of the judgment in the "principal case, *Allfrey v. Blackmore*; on the contrary, the language of the court [*111 expressly excludes any such supposition. The court says, not that the objection came too late, but that the allegation required ought not to form part of the declaration. It is clear, therefore, that notice to the covenantor of the applicant's title is not necessary; a requisition to have the recovery suffered is sufficient, and that may put the covenantor upon inquiring whether the applicant has any right or not to make the requisition.

The next objection is, that there is no allegation of any request to Henry Dymoke. But there is no foundation for this objection, because the covenant is by John Dymoke, and it was sufficient for the covenantee to call on John Dymoke to perform his covenant, or to cause Henry Dymoke to do so.

It has also been urged, that it ought to have appeared on the declaration that the suffering of a recovery was advised by counsel, and that the defendant had notice of this circumstance. The case to which we have been referred for this position is indeed a strong one; though it can hardly be sustained to its full extent, but to the principal point laid down in it, I fully assent. If a covenant be, that a party shall execute such assurance as counsel shall advise, the plaintiff must show what has been advised; but that is not the covenant, the breach of which is complained of here. In the first instance the defendant only engages to cause a recovery to be suffered, and he did not want to be told by counsel that such a proceeding was necessary, because, in the language of the deed, it is admitted to be necessary. The recovery he was to cause to be suffered at all events, but not to do more unless counsel should advise: this is the strict meaning of the language of the covenant, and the words, "*as counsel shall advise*," do not overrule the whole of the preceding sentence, but only the stipulation for assurances other than a recovery. Therefore, "strictly collecting the meaning of the deed from the language of the deed itself, our [*112 judgment must be for the plaintiff.

PARK, J. I concur in what is fallen from my lord chief justice, and as to the expression, "*as counsel shall advise*," it applies only to assurances other than the recovery.

BURROUGH, J. I am also of the same opinion. The constant course of pleading is to assign the breach in the words of the covenant. The plaintiff

states in substance, that he requested the defendant to cause the recovery to be suffered, and the refusal was so general as to render it unnecessary for the plaintiff to take any further or more particular step.

Judgment for the plaintiff.

HILL v. SAUNDERS.

1. The husband cannot sue for arrears of rent accruing after the death of his wife, on a lease of her land by himself and wife under seal during coverture, in which the lessee covenanted with the husband and wife and the heirs of the wife.
2. If the lease be made according to stat. 32 H. 8, c. 28, it continues during the term, notwithstanding the death of the wife; and though her heir is entitled to the rent, he cannot enter or eject.

THE declaration stated that, on the 14th of March, 1818, by a certain indenture then made between the plaintiff and Nancy, then his wife, but since dead, of the one part, and the defendant of the other, the plaintiff and his said then wife did demise, lease, set, and to farm let unto the defendant certain pieces or parcels of land, with the appurtenances, in the parish of Hanbury *113] in the county of Worcester, to hold the said pieces *or parcels of land unto the defendant, his executors and administrators, from the 2d of February then last past for twenty-one years, yielding and paying therefore yearly during the said term unto the plaintiff and Nancy his then wife, since deceased, the rent of 24*l.* by two equal portions at two days, viz., on the 2d of August and on the 2d of February in every year; and the defendant did thereby covenant with the plaintiff and his then wife Nancy, and the heirs of the said Nancy, amongst other things, that the defendant, his heirs, executors, or administrators should and would well and truly pay, or cause to be paid unto the plaintiff and Nancy his then wife, the said rent of 24*l.*; by virtue of which demise the defendant afterwards, on the 15th of March in the year aforesaid, entered into the said demised pieces or parcels of land, and became possessed thereof for the said term; and although after the making of the indenture and during the term, and also after the death of Nancy, viz., on the 2d of February, 1823, the sum of 24*l.* of the rent for one year of the term ending on that day became due from the defendant to the plaintiff, yet the same continued due, in arrear and unpaid, contrary to the covenant.

There were several pleas, of which the third was, that the plaintiff never had any thing in the said premises, except in right of Nancy, whose estate the said pieces or parcels of land were; and that Nancy, after the making of the indenture, and before any part of the said sum of 24*l.* became due, died without issue, leaving John Acton, her brother and heir at law, whereupon all the estate and interest which the plaintiff ever had in the said premises expired, ceased and determined, nor had he from thenceforth thitherto had, nor had he then, any estate or interest therein; and that John Acton, as such heir, threatened the defendant to eject and evict him from the possession of the premises unless the *114] *defendant would attorn and become his tenant, and the defendant was forced and obliged, and did necessarily attorn and become tenant to John Acton. Demurrer and joinder.

Vaughan, Serjt., in support of the demurrer, contended that the plea contained no answer to the plaintiff's action. That at common law, a lease by husband and wife of the wife's land was only voidable after the death of the wife, and did not become void till actual entry by the heirs of the wife; that although the stat. 32 H. 8, c. 28, s. 3, enacts that the rent shall descend to the heirs of the wife, as if no such lease had been made, yet, as under the sixth section the heirs are specially empowered to enter after any act done by the husband alone during coverture, in respect of the freehold of his wife, it must be intended *a fortiori* that such entry is necessary to avoid an act done by husband and wife jointly. He referred to *Dixon v. Harrison*, Vaughan, 46, where

it was holden that the husband might distrain under such a lease as the present for rent which accrued after the death of his wife ;—to *Anderson v. Martindale*, 1 East, 497, where a covenant to A. and his assigns, and to B. and his assigns, to pay an annuity during B.'s life, was holden a covenant in which A. and B. had a joint legal interest, and on the death of A. the right of action accrued to B. ;—also to Serjt. *Williams's* note to *Wooten v. Hele*, 2 Saund. 180, and to *Jeffrey v. Guy*, Yelv. 78.

Lawes, Serjt., contra, was stopped by the court.

BEST, C. J. The lease of the premises in question was made conformably to the provisions of the statute of *H. 8, by deed indented, and under the seal of the wife ; and the covenants with the plaintiff are not in the [*115 ordinary form with him and his heirs, but with him and the heirs and assigns of the wife. The breach assigned is, that the defendant has omitted to pay to the plaintiff rent accruing subsequently to the death of the wife, for which he is now called upon, not by the heirs of the wife, but by the plaintiff, her husband. The defendant says, that before any part of the rent claimed became due, all the interest which the plaintiff ever had in the premises expired ; that he never had any interest except in right of his wife, and that she died before the rent in question became due. Upon this statement, the rent belongs, not to the plaintiff, but to the heirs of the wife, and the plea is clearly distinguishable from that in *Alchorne v. Gomme*, ante, 54, because the defendant does not say that the plaintiff did not lease, or that he had no right to lease, but that his interest in the premises has expired ; and he goes on to say that the heirs of the wife threatened to eject him unless he would attorn. It has been urged, that in such a case he cannot plead any thing short of actual eviction ; but there is no reason why he should be turned out of possession ; the heir has done all that was necessary to possess himself of the rent, and the tenant has acted rightly in not disputing his claim. If the defendant had attorned to a stranger the case would have been different ; but he has attorned to the person who was entitled to the rent under the act of parliament. Much argument has been used to show that the lease was only voidable by the heirs of the wife, and not void at her death ; but the argument does not apply, because the lease is neither void nor voidable, but a good subsisting lease. At common law, certainly, such a lease would have been voidable by the entry of the heir ; but the *evil [*116 occasioned by this, having become excessive on the dissolution of the monasteries, when the grantees of their estates frequently put the lessees out of possession, the legislature made a provision on the subject, and it is only for us to look at that provision in 32 H. 8, c. 28, to answer this argument. The first section recites, that "Fermors, after the deaths or resignations of their lessors, have been with great cruelty expelled and put out of their farms by the heirs or successors of their lessors, by reason of privy gifts of entail, and for that the lessors had nothing in the lands so letten, but only in the right of their wives." The evil therefore to be remedied, was, that at common law a lease of the wife's lands determined on the death of the wife, and the remedy provided was, that the lessee's interest should be guarded by continuing it against the heirs of the wife to the end of the term ; "for reformation whereof be it ordained, that all leases hereafter to be made, shall be good and effectual against the lessors, their wives, heirs, and successors, according to such estate as is comprised in every such indenture of lease." According to this, the rent reserved is continued,—to whom ? to the family of the wife ; not to the husband, whose interest is expired, but to the brother, who has called on the defendant to pay : and he having no legal answer to the demand, does that which the law compels him to do ; for the law will not compel a man to pay to a person not entitled, and put him to recover back the money so paid, when called on by the proper person. The statute then enacts that "the ferm and rent be reserved to the husband and to the wife, and to the heirs of the wife, and that the husband shall

not aliene, discharge, or grant the same rent reserved, longer than during the coverture. In the present case the lease has been made conformably to the provisions of the statute; the lessee covenants with the husband and the heirs of the *117] wife; *the wife dies, and the brother and heir of the wife demands the rent; the defendant says, "In compliance with the terms of my lease and the law of the land, I have submitted to this demand." If this be not a discharge, I know not what is; and am therefore clear, that our judgment ought to be for the defendant.

PARK, J. When the language of the plea is compared with that of the statute, there can no longer be any question. The lease was neither void nor voidable, but by the statute the rent is continued to the heirs of the wife.

BURROUGH, J. It has been argued, that the heir ought to have made an entry; but if, according to the statute, the lease continues, and the heir is only entitled to the rent, such an entry would have been a trespass. The heir, however, asserts his right to the rent, and threatens to eject, which, indeed he could not do, because the lease was still continuing, but the tenant was bound to pay the rent under it to him, and it is clear the husband cannot recover.

Judgment for defendant.

*118] *DOE on the Demise of WATSON v. JEFFERSON.

In 1813, the commissioners for the enclosure of a parish, the tithes of which were vested in several lay impropriators, appointed meetings for receiving claims, and various claims were put in, but none in respect of tithes, within the time limited by the general enclosure act; notwithstanding this, the commissioners in 1817, made J. an allotment in respect of the impropriate tithes of certain land occupied by him, which tithes, as well as the land, J. claimed under the will of P.:—in 1820, W., who claimed these tithes under the heir of P., on the ground that they did not pass by P.'s will, brought an ejectment for the allotment made in respect of them: *Held*, that having omitted to make his claim before the commissioners within the time limited by the act, he could not recover.

THIS was an action of ejectment, tried at the Cumberland Summer assizes, 1821, before HOLROYD, J. The declaration stated the demise to have been made by Watson, on the 1st of February, in the 1st year of G. 4, of ten acres of land and ten acres of moor, with the appurtenances, in the parish of Brumfield, otherwise Bromfield, in Cumberland. The defendant pleaded the general issue, and the jury found a verdict for the plaintiff, with 1s. damages, subject to the opinion of the court on the following case.

George Peat, of Dundraw, in the parish of Bromfield, at the time of his death, was seised in his demesne, as of fee, of a messuage or tenement at Dundraw, consisting of a dwelling-house, out-houses, and about twenty-four acres of land, and had purchased from the lay impropriator all the tithes of corn and grain growing on the messuage or tenement, which tithes were duly conveyed to him by deed, bearing date the 3d of September, 1800.

By will duly executed and attested, bearing date the 22d of September, 1800, George Peat, after directing his executrix to discharge his debts, gave and bequeathed to his wife Mary, all his *freehold messuage and tenement, and all the profits arising therefrom*, at Dundraw, in the parish of Bromfield, during her natural life; he also bequeathed her all his household goods and personal *119] estate for her own proper use; and he declared *his will to be, after the decease of his wife Mary, to devise the above-mentioned freehold messuage and tenement, to be subject and chargeable to such payments as follow; viz., after the decease of his wife Mary, he gave the messuage and tenement to George Peat, of High House, in the parish of Holm Culham, his heirs, executors, or assigns, whom he made and appointed guardian, in trust, to sell and dispose of as thereafter mentioned, viz., after the decease of his wife Mary, George Peat of High House, his heirs, executors, or assigns, were to sell the said messuage and tenement, and first, out of the money arising therefrom, to

pay the heirs, executors, or assigns of testator's wife the sum that had been paid by her for the discharge of testator's debts; then, several legacies mentioned in the will; then, after providing that if his wife should marry again after his decease, she should lose the benefit and profits of his said messuage and tenement, and George Peat, of High House, his heirs, executors, or assigns, should immediately enter and take possession of the messuage and tenement, subject to the payment of the debts and legacies before charged upon it, the testator bequeathed all the remainder and residue of his estate, after the payment of those debts and legacies, unto Dolly Graham, the wife of Joseph Graham, of Wigton. The testator's wife was appointed sole executrix.

The testator died in or about September, 1804, without revoking or altering this will, leaving his wife him surviving, and she was still alive at the time of arguing the case.

He also left a niece and a great-niece him surviving, who were his co-heiresses at law, viz., Dolly Graham, who was mentioned in the will, and Mary Peat Storey, his great-niece, who had married one David Chapman.

At the time of the testator's death, George Peat, the trustee named in the will, was still alive, but he died in or about 1805, leaving George Peat, his only son and heir, him surviving, who also died about May, 1818, having by a [*120 codicil duly executed and attested, devised all his trust and interest in the hereditaments at Dundraw unto John Hewson, in order that he might carry the will of the testator into effect.

In 1813 an act of parliament was passed for enclosing lands in Dundraw, which act it was agreed might be referred to on the argument of the case.

Under this act the commissioners duly appointed meetings for receiving claims, of which notice was duly given, and at some of those meetings claims were put in by the different persons claiming interests under the enclosure act, but no claim was put in by David Chapman, who lived at Manchester, in right of his wife, Mary Peat Chapman, for any right claimed by her, or in her right under the enclosure act, within the time limited by the general enclosure act; nor were any claims at all put in for allotments in respect of tithes by any one.

The piece of ground, the moiety of which was sought to be recovered in this action, was an allotment which had been marked and staked out by the commissioners to the defendant in March, 1817, the commissioners believing, at the time, he was entitled to the whole. On the 21st of June, 1820, the commissioners, at the request of the lessor of the plaintiff, set out an allotment of one acre and seventeen perches, being the moiety of the allotment set out to the defendant, as an allotment in lieu of the tithes claimed by the lessor of the plaintiff from Chapman and his wife as hereinafter mentioned. The commissioners, however, did not execute their award before the trial of this ejectment.

The lessor of the plaintiff rested his title to the moiety of the allotment in question, on indentures of lease and release of the 7th and 8th of April, 1819, made between David Chapman and his wife of the one part, and the lessor of the plaintiff of the other, by which David Chapman and his wife [*121 granted, released, ratified, and confirmed unto the lessor of the plaintiff, his heirs and assigns,

All that, their or the one of their undivided half part or share of the tithes of corn, grain, sheaves of corn, and of hay growing upon all that messuage and tenement, lands, hereditaments, and premises, late the property of George Peat, deceased, situate at Dundraw, and also all that moiety or undivided half part of all allotments of common or waste land, then already allotted and set out, or thereafter to be allotted or set out by the commissioners appointed by the said act for enclosing lands in Dundraw, in respect of said estate, tithes and hereditaments, as the same were then laid down or intended to be laid down, on the plan intended to be annexed to the award of the said commissioners.

To hold the same unto and to the use of the lessor of the plaintiff, his heirs and assigns for ever.

In Trinity term, 1819, a fine with proclamations was levied between the said John Watson, plaintiff, and Chapman and wife, deforciant, of the moiety of tithes of corn and hay arising out of 100 acres of land at Dundraw, and of twenty acres of common land at Dundraw.

The defendant claimed title under a conveyance of the tithes, and of the common-right allotment which belonged to the same, from John Hewson, the devisee of George Peat, the trustee under the will, and Dolly Graham, by lease and release, dated the 6th and 7th of July, 1818.

At the trial it was contended, on the part of the plaintiff, that the tithes did not pass, under the will of the testator, to his wife for her life, with remainder over, as in the will mentioned, by the description of his freehold messuage and tenement, and all the profits arising therefrom; it was contended by the defendant that they did pass.

*122] It was also contended by the defendant, that no claim having been put in by Chapman and wife, before the commissioners, the claim set up by Watson, under the above conveyance to him, was too late, and that the same was altogether void with reference both to the particular and general enclosure acts.

Both these points were reserved by the judge, and upon the whole,

The question for the opinion of the court was, whether the plaintiff was entitled to recover? If so, the verdict was to be entered for the plaintiff, with 1s. damages; if otherwise, for the defendant.

Cross, Serjt., was for the lessor of the plaintiff, and Taddy, Serjt., for the defendant. There was a long and learned argument, as to the construction to be put upon George Peat's will, and particularly whether the tithes in question passed under the words "*profits*." Upon these points the court gave no opinion. But it was urged on the part of the defendant, that David Chapman not having made any claim before the commissioners for an allotment in respect of the tithes in question at the time of the enclosure, nor within the time pointed out by the general enclosure act, 41 G. 3, c. 109, s. 6, and the act relating to this enclosure, 53 G. 3, c. 141, the lessor of the plaintiff was now completely barred.

To this it was answered, that the defendant being in the same situation, and having also omitted to make any claim before the commissioners, was estopped to make this objection, [*Doe v. Pegge*, 1 T. R. 758, n.,—BEST, C. J. That case has been overruled,](a) and that claims in respect of tithes were not within the meaning of the sixth section *of the general enclosure act, or of the

*123] private act relating to this enclosure.

BEST, C. J., (after stating the case.) The first question arises on the construction of the will of George Peat, but on that we give no opinion, because the judgment of the court is against the plaintiff on the second point; and the following is the part of the case on which our decision turns.

"In 1813 an act was passed for enclosing lands in Dundraw; under this act the commissioners duly appointed meetings for receiving claims, of which notice was duly given, and at some of those meetings claims were put in by the different persons claiming interests under the enclosure act, but no claim was put in by David Chapman in right of his wife for any right claimed by her, or in her right under the enclosure act, within the time limited by the general enclosure act, nor were any claims at all put in in respect of allotments in respect of tithes by any one." Now in the action of ejectment the claimant must recover on the strength of his own case, and cannot avail himself of defects in the case of the defendant. But the lessor of the plaintiff, in this case, has failed in establishing his claim, because if he ever had any right, it is

(a) Vide 2 T. R. 684, *Doe dem. Hodsdon v. Staple*.

now barred by the general enclosure act, 41 G. 3, c. 109, s. 6, which enacts, "That all persons and bodies corporate or politic who shall have or claim any common or other right to or in any such lands so to be enclosed, shall deliver or cause to be delivered to such commissioner or commissioners, or one of them, at some one of such meetings as the said commissioner or commissioners shall appoint for the purpose, (or within such further time, if any, as the said commissioner or commissioners shall for some special reason think proper to allow for that purpose,) an account or schedule in writing, signed by them or their respective husbands, *guardians, trustees, committees, or agents, of such [*124 their respective rights or claims, and therein describe the lands and grounds, and the respective messuages, lands, &c., in respect whereof they shall respectively claim to be entitled to any and which of such rights, in and upon the same or any part thereof, with the name or names of the person or persons then in the actual possession thereof, and the particular computed quantities of the same respectively, and of what nature and extent such right is, and also in what rights and for what estates and interests they claim the same respectively, distinguishing the freehold from the copyhold or leasehold, or on non-compliance therewith, every of them making default therein, shall, as far only as respects any claim so neglected to be delivered, be totally barred and excluded of and from all right and title in or upon such lands so to be divided respectively, and of and from all benefit and advantage in or to any share or allotments thereof: all which said claims or accounts shall, at all seasonable times until after the execution of the said award, be open to the inspection and perusal of all parties interested or claiming to be interested in the premises, their respective agents or attorneys, who may take copies thereof or extracts therefrom respectively; and if any person, &c., interested or claiming to be interested in the premises, shall have any objection to offer to any such account or claim, the particulars of such objection shall be reduced into writing, and signed by them or their respective husbands, &c., and shall be delivered to the said commissioner or commissioners, at or before some other meeting of such commissioner or commissioners, to be by him or them appointed for that purpose; and no such objection shall afterwards be received, unless for some legal disability or special cause to be allowed by the said commissioner or commissioners." It has been argued, that this section only *applies to allot- [*125 ments in respect of land, and not to allotments in respect of tithes, and if this were the case of a rector to whom all the tithes of the parish belong, there might be some ground for the argument which has been pursued; but, on looking at the private act on which this case turns, it appears that the tithes were vested in a great number of persons, and the commissioners are authorized to set out allotments in respect of them for the various proprietors, according to their respective rights. It appears to us, that it was equally necessary for the owners of tithes to make their claim before the commissioners, as for owners of land. Unless this were done, the commissioners might make an allotment, and when the occupier had gone to expense and improved it, another claimant might come and establish a superior title. It would be manifest injustice to allow any such attempt, and inconsistent with the expressions of the general enclosure act, which specifies as persons bound by its provisions, "proprietors of lands, tenements, and hereditaments." Hereditaments is a word peculiarly applicable to tithes, and it was introduced to prevent the mischiefs arising from omission to establish a claim before the commissioners. It was intended, that every person should assert his right within a given time, and if he omitted to do so, should forfeit all right. In the present case, meetings were regularly holden, and Chapman made no claim; if he could now come forward with success he might lie by till the land was improved, and then recover it with all its improvement. The legislature never meant such injustice; they have expressly excluded it by the language of the sixth

section; and the excellent maxim of law *vigilantibus et non dormientibus subveniunt leges*, applying forcibly to the plaintiff's case, our judgment must be for the

Defendant.

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*WOLLEN v. ANDREWES.

Devise of an estate to trustees in trust to permit devisor's six children, A., B., C., D., E., F., (B. being a daughter, and the others, sons,) to receive a sixth part each, of the rents during their life and lives, and after their respective deceases, to permit the child or children of the child so dying to receive the rents of the share of the child so dying in equal shares and proportions; and so on in like manner from children to children: in case either of the devisor's children should die without leaving issue, the rents of the child so dying to go to the survivor or survivors.

A., C., E., and F. died without issue, and B., leaving a son and two daughters:

Held, that the devisor's children took estates tail; that upon the death of A., C., E., and F., their shares accrued to D. as survivor, and that B.'s son was only entitled to one-sixth.

THIS action was tried before HULLOCK, B., at the Somerset Spring assizes, 1823, and a verdict for 37l. 10s. was entered for the plaintiff, subject to the opinion of this court on the following case.

Samuel Andrewes, of Wrington in Somerset, innholder, being seised in fee of certain freehold estates in the county of Somerset, by his last will bearing date 10th June, 1785, and duly executed and attested to pass real estates, gave and devised the same (together with his personal estate) to Peter Cox, his heirs, executors, administrators and assigns, according to the nature and tenure thereof, subject to such mortgages and incumbrances (if any) as affected the same, upon the several trusts, and to and for the intents and purposes, and under and subject to the powers, directions, and contingencies thereafter expressed and declared of and concerning the same, upon trust, to permit and suffer his six children, (namely,) Richard, Sarah, wife of Edmund Wollen, Samuel, William, John, and Thomas, to have, receive, and take one-sixth part or share each, of and in all and singular the net rents, issues, and profits thereof for and during the terms of their natural life and lives, and from and immediately after their respective deceases, then, upon further trust, to permit and suffer all and singular the child or children of such of his sons or daughter so dying, to have, receive, and take the rents, *issues, and profits of such share or shares of him, her, or them so dying, of and in the said estates before devised, in equal parts, shares, and proportions, and so in like manner from children to children. His will further was, that in case any or either of his said children should happen to die without leaving any lawful issue, then that the rents, issues, and profits belonging to such of his sons or daughters so dying should go to and be received by the survivor or survivors. The testator died in 1787, without altering or revoking his will as to the said devisees, leaving all the devisees named in the will, him surviving. Richard, the eldest son of the testator, died in 1792, intestate and without issue, leaving a widow and the five other devisees him surviving. Sarah Wollen, another of the devisees, died in 1797, leaving four children, namely, George Wollen, the plaintiff, her only son; Hannah, afterwards the wife of George Thayer; and Mary and Elizabeth, her daughters, her surviving. Mary Wollen, the sister of the plaintiff, died in 1807, intestate and unmarried, leaving the plaintiff and her sisters, Hannah and Elizabeth, her surviving, and who were still living. John, testator's fourth son, died in March, 1819, intestate and without issue, leaving a widow and his brothers Samuel, William, and Thomas, and his nephew and nieces, the plaintiff, Hannah Thayer, and Elizabeth Wollen, him surviving. Thomas, testator's youngest son, died in September, 1819, intestate and without issue, leaving a widow and his brothers Samuel and William, and his nephew and nieces, the plaintiff, Hannah Thayer and Elizabeth Wollen him surviving. Samuel, the testator's second son, died in 1820, intestate and without issue, leaving his brother William, and his ne

*127]

phew and two nieces him surviving. The six devisees, whilst they were all living, received the rents and profits of the estates in equal proportions. After the death of Richard, and up to the period of the death of *Sarah Wollen, (the mother of the plaintiff,) the remaining five devisees received [*128 the rents, &c., in equal proportions. After the death of Edmund and Sarah Wollen, and up to the period of the death of John Andrewes, one-fifth of the rents and profits was paid unto and amongst the plaintiff and his sisters, Hannah Thayer and Elizabeth Wollen, as the children of Sarah Wollen deceased, and other fifth part to each of the then surviving brothers of Sarah Wollen, Samuel, William, John, and Thomas. After the death of John Andrewes, and up to the period of the death of Thomas, the plaintiff and his sisters received one-fourth part of the rents and profits between them, and one other fourth part was paid to each of the then surviving brothers, Samuel, William, and Thomas. After the death of Thomas, and up to the period of the death of Samuel, the defendant, who received all the rents and profits, paid to the plaintiff one-sixth part thereof. After the death of Samuel, the defendant received the rents and profits amounting (after allowing disbursements) to the sum of 55*l.* and a compensation from the tenant for some dilapidations, amounting to 20*l.* The defendant was always ready and willing, and duly offered and tendered to the plaintiff one-sixth part thereof, which he refused, conceiving himself to be entitled to one moiety thereof; prior to the receipt of those moneys by the defendant, the plaintiff gave notice to the tenant in possession of his claim, and forbade him to pay the whole rent to the defendant, and the defendant received the same with full knowledge of such claim.

The questions for the opinion of the court were, what estates were taken by the devisees under the will of the testator? and what estate the plaintiff was entitled to in all or any and what part of the premises, under the said will?

**Vaughan*, Serjt., for the plaintiff. By this devise, the grandchildren of the devisor took estates tail, in common, with cross remainders over; [*129 and if this construction, which is warranted by the case of *Mogg v. Mogg*, 1 Merivale, 654, be put on the will, the plaintiff and defendant now take each of them moieties of the property. The rules of law will not admit the literal execution of the devisor's intention to give the grandchildren estates for life, because that would go to create a perpetuity; but the court will carry it into effect as far as they can, and in order to accomplish the general and prevailing intention will sacrifice any particular intention inconsistent with it. The devisor rejects the rules of primogeniture, and his general intention appears to be, that all his children, and the children of each of them, should stand on an equal footing: now, although in general cross remainders cannot be implied between more than two persons, yet the court have gone farther where there has been a manifest intention to create them between a greater number: such an intention is manifest here, and there are express authorities which, on a will like the present, warrant the court in enlarging into an estate tail an apparent estate for life, when the giving an estate for life would frustrate the testator's intentions. *Robinson v. Robinson*, 1 Burr. 38; *Doe v. Applin*, 4 T. R. 82.

Taddy, Serjt., for the defendant. The construction proposed on the part of the plaintiff is met with this difficulty, that though it proceeds on the profession of equality, it gives nothing to the plaintiff's two sisters. The devisor's children, therefore, took estates for life, with cross remainders among themselves, and the defendant, as heir at law, is entitled to the shares of those who have died. The limitation over for life to the *children of the children [*130 is void, as tending to create a perpetuity: according to all the cases the expressions used in this will only give the children an estate for life. In *Pearson v. Vickers*, 5 East, 548, (which was doubted in *Doe dem. Wright v. Jenson*, 5 M. & S. 95.) the devise over was *in default of issue*; but here the devise is for life, and then over, if the devisees should die without *leaving issue*:

and such expressions have been repeatedly holden to carry only an estate for life. As to cross remainders, they cannot be implied between more than two, unless it clearly appears that such was the deviser's intention. In *Watson v. Fraser*, 2 East, 34, such intention clearly appeared. The court can either effectuate the deviser's intention upon the expressions he has employed, or not; but the doctrine of accomplishment *cy pres*, has never been applied to the construction of wills.

Vaughan having been heard in reply, the court took time to consider, and now delivered their judgment.

BEST, C. J., (after stating the case.) We are all of opinion that the plaintiff is entitled to only one-sixth of the property. The legal estate is in Peter Cox, but the plaintiff has an equitable estate tail in one-sixth part, and is entitled to one-sixth of the proceeds. On the face of the will the testator has given only an estate for life to his children, and an estate for life to the grandchildren; but we are of opinion that by the operation of subsequent words the six children took estates tail in the premises, because the testator goes on to attempt that which is impossible,—to give an estate for life to unborn grandchildren; he is not allowed by law so to advance towards the creation of a perpetuity: but we must do that which will approach the nearest to his intentions, and, therefore, the second limitation must be construed as an enlargement of the first estate for life. But there are other words in the will which seem to place the matter out of doubt; for the share of each parent is to go to the children; and then, how is it disposed of? "In case any or either of the said children should happen to die without leaving any lawful issue, then that the rents, issues, and profits belonging to such of his sons or daughter so dying should go to and be received by the survivors or survivor." Here then is a gift over after failure of issue, and that would give the first taker an estate tail. Comments have been made in the argument, upon the word "*leaving*," and it has been said that the courts have never enlarged into an estate tail an apparent estate for life, when the remainder over has been limited on the event of the first taker's dying without leaving issue; but that is not according to the cases, because there are many in which such an expression has been held to carry an estate tail, as in *Franklin v. Lay*, 2 Bligh's Rep. 59, n. There the devise was to the testator's grandson John, to hold to him, "and to the issue of his body lawfully to be begotten, and to the heirs of such issue for ever," with devise over if John should "die without leaving any issue of his body lawfully begotten;" and the vice-chancellor held that this carried an estate tail to John. The word "*leaving*" was not confined to issue existing at the time of the death, but was holden to give an estate tail. *Jesson v. Wright*, in the same book, 2 ib. 1, is a decision to the same effect, and in that case *Doe dem. Strong v. Goff*, 11 East, 668, was overruled. The chancellor, indeed, said he was "sorry such a decision was necessary;" but the doctrine was too well established to be shaken. An estate tail to the mother of the plaintiff, in the present case, gives him one-sixth of the property; *132] and this brings me to the consideration of the shares of those who died without issue. Four of them having so died, is the plaintiff entitled to a moiety, or does the whole go to the survivor? On one side it has been contended that cross remainders arise out of the devise: this argument was met with the difficulty that cross remainders cannot be implied between more than two parties, to which it was answered, that the court will imply cross remainders where there appears to have been an intention on the part of the testator that the property should be so disposed of; but we cannot imply them here, because the testator expressly gives the property to the survivor or survivors; that is, to the survivors for life, and afterwards to the last survivor. What estate the survivor takes it is not necessary for us to decide, because if he does not take a fee under the will, he will take it as heir at law. We think the

accruing shares passed on to the defendant as survivor, and there is a case not unlike this, *Doe dem. Borwell v. Abey*, 1 M. & S. 428; in that case the testator gave lands to his three sisters, during their joint lives, and the life of the survivor, to take as tenants in common, and not as joint tenants; remainders to trustees to preserve contingent remainders, and from and after their respective deceases, and the decease of the survivor, remainder over; and the question was, what estate the sisters took? The court held that they either took the property as joint tenants, to be regulated in its enjoyment as tenants in common, or as tenants in common with benefit of survivorship, and, therefore, that the survivor had a right to all the property after the death of her sisters. What Lord ELLENBOROUGH said in giving judgment,—“the words tenants in common are of flexible meaning, and may be understood that although they should take by survivorship as joint tenants, yet the enjoyment was *to be regulated among them as tenants in common: The prevailing intention of the testator seems to have been, that the estate should not go over till the death of the survivor,”—applies to the present case, because the testator has expressly mentioned the survivor and survivors, by which he means, not the surviving *stocks*, but the surviving children. We think, therefore, the plaintiff is entitled to one-sixth, and that judgment must be entered accordingly.

Judgment for plaintiff for one-sixth.

EVANS v. YEATHERD.

In an action against Y. for the price of goods sold, *Held*, that F. was not a competent witness to prove that the goods had been sold to Y. and F. jointly, and that they had been paid for by remitting a debt due from the vendor to the firm of Y. and F.

EVANS sued Yeatherd to recover 28*l.*, the value of ten chaldrons of coals delivered to Yeatherd. The defence set up, was, that Yeatherd was in partnership with Follett, and that the coals in question were not sold to Yeatherd separately, but delivered to him on the joint account of Yeatherd and Follett in part payment of two bills of exchange, upon which it was alleged Evans stood indebted to the firm of Yeatherd and Follett.

At the trial, London sittings after Michaelmas term last, Yeatherd called Follett to establish this defence, when his testimony was objected to by the counsel for the plaintiff, on the ground that he was an interested witness. It was urged that, but for the admission of such testimony, a verdict might go against Yeatherd, in which case Follett, as his partner, would be liable to contribute for the price of goods, which upon Follett's showing were delivered on the partnership account, but that he would relieve himself from this contribution, if, *in consequence of the testimony he proposed to give, it should be believed that Evans was indebted to the firm of Yeatherd and Follett, and [134] the verdict should in consequence pass in favour of Yeatherd.

The learned judge, however, who presided, admitted the witness, subject to the opinion of this court as to his competency; and a verdict having been found for the defendant,

Pell, Serjt., obtained a rule nisi for a new trial, on the ground that this witness ought to have been excluded.

Vaughan, Serjt., now showed cause against the rule, and argued that the witness was indifferent. As a member of the firm, his testimony certainly went to exonerate him from contribution on account of the demand set up by Evans against Yeatherd; but on the other hand, it deprived the firm of a claim against Evans to the same amount upon the two bills of exchange, so that, upon the whole, the witness could neither gain nor lose by the effect of his testimony; and the verdict against Yeatherd would not have been evidence against Follett.

Pell and Wilde, Serjts., in support of the rule, renewed the objection made at the trial, and added, that with respect to the supposed indifferency of the

witness, it could only arise by his being permitted to prove a debt due to himself and his partner; and it was no more allowable for one of the partners to prove a debt due to a firm, than for a plaintiff to prove his own demand. If such testimony could be received, pleas in abatement would become useless. In *Hudson v. Robinson*, 4 M. & S. 475, one of the three partners was called; but it was not on account of the partnership concern, but by the plaintiff, *135] who had proceeded against one of the partners, to show that the others had no concern in the contract.

BZET, C. J. This was an action of assumpsit brought by Evans against Yeatherd alone, to recover a small sum of money alleged to be due upon a sale of coals to Yeatherd. But if the statement made on the part of the defendant be true, Follett was also interested, and might have been joined in the action. The plaintiff, however, had to prove a delivery to Yeatherd alone; having proved that, he would have been entitled to a verdict, and but for the evidence adduced on the part of the defendant, that is, the testimony of Follett, he would have obtained a verdict. But if he had done so, would that verdict have affected Follett? It is true, the record would not have been evidence to establish any claim against Follett, but only to show the amount that had been recovered. But it is clear, that either at law or in equity, Yeatherd would have been entitled to contribution from Follett in respect of the plaintiff's demand; and if, in answer to a bill in equity, Follett should answer, that he had the coals, but that they had been paid for by the bills due to the firm from Evans, the chancellor would not inquire into that, but, if necessary, would compel Follett to share in the misfortune of paying twice.

If Yeatherd would be entitled to contribution, Follett was an interested witness, and ought not to have been admitted; and the plaintiff's rule must be made absolute.

PARK, J. As soon as it appeared that the defendant and Follett were joint contractors, I thought Follett was not an admissible witness, because he was liable to contribute towards satisfying the plaintiff's demand. This contribution, it is admitted, Yeatherd might enforce if a verdict were to go against him, and he had the means of *proving by other evidence that they both had *136] an interest in the coals. Follett, therefore, had a direct interest in the event of the cause, and ought not to have been admitted.

Rule absolute.

FRANCES MATTHEWS, by her next Friend, v. LAZARUS JONES VENABLES, WILLIAM ECCLES, JOHN NAYLOR WRIGHT, THOMAS HIGSON, ELIZABETH BURROWES, FRANCES HARRISON, and the ATTORNEY-GENERAL.

A., by will duly attested, devised all her freehold property to trustees for the use of B.; seven days after executing the will, she conveyed a part of her property to trustees for a charitable foundation, pursuant to 9 G. 2, c. 36; nine days after, she made a codicil, attested by three witnesses, to be taken as part of her will, by which codicil she appointed another trustee and ordered her money out at mortgage to be first applied in payment of her debts. A. died within a twelvemonth after the deed executed pursuant to 9 G. 2, c. 36: *Held*, that the deed did not operate as a revocation of the will.

THE vice-chancellor, upon the hearing of this cause, by decree, dated 10th of June, 1822, directed that the opinion of the Court of Common Pleas should be taken on a case, in substance as follows:

Fances Higson was, at the time of making her will or appointment hereafter mentioned, entitled, under a marriage settlement, to certain freehold estates, which were vested in a trustee or trustees, and their heirs, in trust, to permit her and her assigns to receive, notwithstanding her coverture, the rents and profits for her life, to her own sole and separate use, and to stand seised of the estate, to the use of such persons, and subject to such limitations, and charge-

able in such manner as she, notwithstanding her coverture, should by any deed or writing, or deeds or writings, to be by her signed in the *presence of [*137 two or more credible witnesses, or by any writing purporting to be her last will and testament, to be by her executed in the presence of three or more credible witnesses, give, direct, limit, and appoint; and for want of such direction, limitation, and appointment, and as to such part thereof whereof no such gift, direction, limitation, or appointment should be made, to the use of her right heirs for ever.

On the 20th of June, 1812, she being so entitled, and being also entitled to certain copyhold and leasehold estates, duly made published and declared her last will and testament and appointment in writing, dated on that day, which will and appointment was executed by her, in the presence of, and duly attested by three witnesses; and she thereby declared, that she had made the same in pursuance of the powers and authorities vested in her by the marriage settlement, and in pursuance of all powers and authorities otherwise vested in her; and after thereby revoking all former wills, and charging all her real and personal estate with the payment of her debts, funeral and testamentary expenses and legacies, except certain legacies to charitable uses hereinafter mentioned, (a) she gave, devised, and bequeathed, directed, limited, and appointed, to L. J. Venables, William Eccles, and James Brooke, her trustees and executors thereinafter appointed, their heirs and assigns for ever, all her real estate whatsoever, both freehold, copyhold, and leasehold, chargeable as above, to hold the same and every part thereof unto L. J. Venables, William Eccles, and James Brooke, their heirs, executors, administrators, and assigns, upon the several trusts, and to and for the several uses, intents, and purposes hereinafter mentioned concerning the same, viz., part thereof to the use *of William Penketh for [*138 life, with remainders over, and other part and the residue to the plaintiff.

In about seven days after the date and execution of this will, the testatrix executed a certain indenture, dated the 27th of June, 1812, and made between her of the one part, and the Reverend Samuel Renshaw, Samuel Dutton, Allan Pearson, and L. J. Venables of the other, whereby, after reciting the said marriage settlement, and stating that articles of separation had been made and executed between her and her husband, that they lived separate and apart, and that she had no near relations, and was desirous that her property should be settled, applied, and disposed of, in such manner as therein mentioned, she, in pursuance of all powers and authorities to her in that behalf in anywise belonging, did by that deed, sealed and delivered in the presence of two credible witnesses, and intended to be enrolled in Chancery, declare, direct, order, limit, and appoint, that all the freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments hereinafter particularly mentioned and described, and which she had full power and authority to dispose of, and the moneys therein mentioned, should be conveyed to the before-mentioned persons as trustees, upon trust, as soon as conveniently might be, to get in the sum of 8000*l.* due to her on certain real securities, and to invest the same upon real or government securities, as the trustees, with the approbation of her, Frances Higson, in her lifetime, and after her decease, in their own discretion should think proper, and pay and apply the issues and profits thereof to and for her use, or as she should appoint during her life; and she thereby declared that the 8000*l.* should be, by her approbation and during her lifetime, and afterwards with the approbation of the trustees next hereinafter mentioned, invested in the purchase of lands, tenements, and hereditaments in England or Wales, being freehold *of inhe- [*139 ritance, to be conveyed to the trustees and the persons before named, and in the meantime to be invested in real or government securities, and the dividends and interest to accumulate until laid out in such purchase; and it was thereby declared, that the yearly rents and issues of the lands so to be purchased

(a) No charitable uses were mentioned in the will.

should be applied, at the meetings of the clergy of the archdeaconry of Chester, to the relief of widows of clergymen of the church of England, in the manner therein directed; and Frances Higson did thereby declare and agree, direct, limit, and appoint, that all the estate in the said indenture called the freehold estate, situated at Club Moore, in West Derby, then in the possession of Mr. Hewitson, (but which estate was in fact copyhold,) and all her estates in the said indenture called her copyhold estates, situate in Carr-lane and Townsend's-lane, in West Derby, (but which estate in Carr-lane was in fact freehold,) together with the appurtenances, should be granted, conveyed, and assured unto the said Samuel Renshaw, Samuel Dutton, Allan Pearson, and L. J. Venables, to the use of the trustees thereinbefore named, and that the rents and profits thereof should be applied and disposed of from time to time in the purchase of a piece of land, and in the erection of proper buildings, for the purpose, as the trustees should think fit, and in the support and maintenance of two schools, to be erected at Club Moore, the one for boys, the other for girls; and the will contained directions for maintaining, educating, and clothing such children.

On the 4th of July, 1812, Frances Higson acknowledged this indenture, for the purpose of enrolment, and on the 6th it was accordingly enrolled in Chancery.

On the 13th of July, 1812, Frances Higson duly made and published a codicil to her will, which codicil was executed in the presence of and attested by *140] three witnesses; whereby, after desiring that the said codicil *might be annexed to, and taken as part of her will, and noticing that by her will she had appointed James Brooke one of her trustees and executors thereof, she revoked such appointment of James Brooke, and nominated John Naylor Wright in his room, to act in conjunction with the other executors and trustees named in the will; and after giving a legacy to J. N. Wright, she directed her executors and trustees, in the first place, to apply her personal estate and money due on mortgage on freehold and leasehold securities, toward the payment of her debts and the legacies given by her will; and in case the same should not be sufficient, to raise, by sale or mortgage of her houses in Liverpool, or any other part of her freehold or leasehold estates, a sufficient sum for that purpose; and she did, for that purpose, direct, limit, and appoint, that her executors, and the survivor of them, their heirs and assigns, should and might, as and when they thought proper, sell and convey the messuages, lands, and hereditaments devised to them, either absolutely or by way of mortgage, with directions for enabling the executors and trustees to make good titles, and give valid receipts to the purchasers or mortgagees: and Frances Higson, by this codicil, did ratify and confirm in every other respect her last will and testament.

The testatrix died on the 21st of November, 1812, and the freehold estates which are comprised in the indenture being the same which would have passed by the residuary devise in the will or appointment, if the indenture had not been made, the questions submitted for the opinion of the court were,

First, whether the will or appointment of Frances Higson, dated 20th of June, 1812, was revoked as to the said freehold estates, by the indenture dated the 27th of June, 1812? and,

Secondly, whether, if the will or appointment were so revoked, it was republished and made good as to the *said estates, by the codicil dated the *141] 13th of July, 1812?

Peake, Serjt., for the plaintiff. First, the will was not revoked by the deed of appointment. That deed did not operate to alter any estate of the testatrix, or pass any interest; and as merely indicative of intention it had no effect, because it was not attested by three witnesses. No estate of the testatrix was altered, no interest passed, because by 9 G. 2, c. 36.(a) an alienation in mort-

(a) By which it is enacted. (s. 1.) That no manors, lands, &c., nor money to be laid out in ~~lands~~, shall be given for charitable uses unless by deed indented and executed before two wit-

main is rendered null and void, unless a twelvemonth elapses between the execution of the deed and the death of the settlor. In the cases in which a will has been holden to be revoked by an incomplete conveyance, as by a bargain and sale before enrolment, some interest has been holden to pass by the deed. The bargainee, for instance, has a sufficient interest to become tenant to a præcipe (Ventr. 361.) and the deed may be enrolled after his death, *Taylor v. Jones*, 1 Salk. 389. Before the statute of frauds, by which three witnesses are requisite to render effectual the revocation of a will, though a mere covenant would not effect a revocation, a feoffment would, *because it was indicative of the feoffor's intention, (1 Roll. Abr. 615, pl. 3, 4. 7.) But [*142 since the statute, there must be an express revocation properly attested, or the passing of an interest out of the deviser; *Edlestone v. Speake*, 1 Show. 89, Carth. 80; *Onions v. Tyrer*, 1 P. Wms. 348. In *Shove v. Pink*, 5 T. R. 124, the deed conveyed an interest.

But, secondly, if the deed operated as a revocation of the will, the codicil amounted to a republication of it. Where a codicil refers to a will, and is to be taken as part of it, that is a republication of it. *Goodtitle d. Woodhouse and Others v. Meredith*, 2 M. & S. 5; *Pigott v. Waller*, 7 Ves. jun. 98.

Wilde, Serjt., contra. First, the deed passed an interest, and operated as a revocation of the will. A slight alteration in the situation or estate of a testator is sufficient to revoke a will, *Doe dem. Lushington v. Landaff*, 3 N. R. 491. Here there was a valid execution of the power, by which the testatrix parted with all her interest in the property of which she had the disposal: according to the provisions of the 9 G. 2, c. 36, s. 1, the gift is to take effect in possession immediately upon the execution of the deed, so that unless an interest is allowed to pass under it from the donor to the trustees, the whole intent of the statute is defeated. The third clause only renders a conveyance void, which is not made in the manner and form prescribed by the statute; that is, attested by two witnesses and duly enrolled; and if it had been intended that the death of the donor within twelve months should also have been a ground of nullity, that ground would have been specified. But *Shove v. Pink* and many other cases decide, that even an imperfect *conveyance may operate as a revocation of a will. Even though under the operation of the [*143 statute, the property should revert to her heir after her death, it is clear the testatrix could have no interest in the property during her life, and therefore none at the time of executing the codicil. The property in question is not specified in the will, and though, notwithstanding that, it might pass if there were no intention expressed to the contrary, (*Goodright v. Downshire*, 2 B. & P. 600,) yet here,

Secondly, a contrary intention is manifested by the circumstance of the codicil's bearing date only nine days after the execution of the deed: there is nothing said in the codicil touching the deed, and if the testatrix had lived twelve months, the codicil would not have affected it; the codicil, therefore, cannot operate as a republication of the will, at least as to this property; and from *Strong v. Teatt*, 2 Burr. 912, and *Doe d. Cholmondely v. Wetherby*, 11 East, 322, it appears that the court may restrain general expressions or carry them into effect, as will best meet the intentions of the deviser. *Bowes v. Bowes*, 2 B. & P. 500, is to the same effect. The only object of this codicil is to change a trustee.

passes twelve months before the death of the donor, and enrolled in Chancery.—(S. 3.) "That all gifts, grants, &c., whatsoever of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, &c., or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, &c., or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the 24th day of June, 1736, be made in any other manner or form than by this act is directed or appointed, shall be absolutely and to all intents and purposes null and void."

Peaks, in reply. The clear intention of the testatrix in making a codicil the day after executing the deed was this, that if she should live the twelve months required by statute to render the deed available, the property should go according to the provisions of the deed; but if she should die in the mean time, and the deed thereby be rendered void, then the property should go according to her will. But the deed, though it conveyed a title to the trustees, left in the testatrix all the beneficial interest in the property till the time of her death, and

*144] *if no interest passed out of her, no revocation was effected.

The following certificate was afterwards sent:

This case has been argued before us. We have considered it, and are of opinion, that the will or appointment of the said Frances Higson, dated the 20th of June, 1812, was not revoked as to the said freehold estates by the said indenture dated the 27th of June, 1812.

W. D. BEST.
J. A. PARK.
J. BURROUGH.

THOMAS DALBY, the Elder, and Others, v. THOMAS PULLEN and Others.

Devise to S. G. for life, remainder to N. G., son of S. G., and his heirs; but if N. G. should die in the lifetime of S. G. without issue, and there be no other issue of S. G., then to the use of such persons as S. G. should appoint. S. G. and N. G. appointed and conveyed in fee to F.: *Held*, a valid conveyance.

In pursuance of an order made by the vice-chancellor, in this cause, dated the 15th of March, 1823, a case in substance as follows was stated for the opinion of the Court of Common Pleas.

Nicholas Morrell, of London, innholder, by his will dated 13th October, 1756, after giving several specific and pecuniary legacies, gave and bequeathed all the rest and residue of his estate, both real and personal, to George Carter and Thomas Stagg, and the survivor of them, and the heirs, executors, and administrators of such survivor, upon trust to and for the uses, and subject to the provisions, powers, and limitations thereafter limited and declared, viz., as to all the freehold estate which he should be seised, possessed of, or entitled to at his death, to the sole and separate use of his daughter, Sarah Galwith, for life, without impeachment of waste; and from *and after the determination of

*145] that estate to the use of George Carter and Thomas Stagg, and their heirs, during the life of Sarah Galwith, in trust to preserve the contingent uses and estates thereafter limited, but nevertheless to permit and suffer his said daughter to take and receive the rents and profits to her own proper use during her life, notwithstanding any coverture, it being the testator's express mind and will that neither her then present nor any after-taken husband, should have any thing to do therewith, and neither that the same nor any part thereof should be subject to their or any of their debts or engagements; and from and after the decease of his daughter Sarah, subject to an annuity of 50*l.* thereby devised, to the use of his grandson, Nicholas Galwith, son of Sarah, and his heirs and assigns, for ever; and if Nicholas Galwith should die without issue in the lifetime of the said Sarah, and there should be any other issue of her's then living, then to the use of such issue of his daughter, share and share alike, if more than one, to hold as tenants in common, and not as joint tenants, and to the heirs and assigns of such issue respectively for ever; and if there should be but one such issue, then to the use of such one, and his or her heirs and assigns for ever; but in case Nicholas Galwith should die without issue in the lifetime of the testator's said daughter, and there should be no other issue of her body then living, then to the use of such person or persons, and to such intents and purposes, and in such shares as his said daughter Sarah, notwithstanding her cover-

ture, or whether she should be covert or sole, by any deed or deeds, or by her will in writing under her hand and seal, duly executed in the presence of three or more credible witnesses, should direct, limit, or appoint; and in default of such direction, limitation, or appointment, to the use of the testator's right heirs for ever.

*On the 12th of June, 1767, the testator died, and his will was proved [*146 by Thomas Stagg, the surviving executor.

In 1768 John Galwith and the said Sarah, his wife, and Nicholas Galwith, their son, together with Sarah Walker, an annuitant and legatee under the will, filed their bill in Chancery against Thomas Stagg and against John Morrell, as the eldest son and heir of John Morrell, who was the eldest brother of the testator, and as such his heir at law, praying that the will might be established and the trusts performed; and by a decree, dated the 10th of May, 1768, the will was declared to be well proved, and the trusts thereof were decreed to be performed.

By an indenture dated the 6th January, 1773, made between the said Sarah, wife of John Galwith, of the one part, and John Carter of the other part, Sarah Galwith, in consideration of 910*l.*, granted to John Carter an annuity of 130*l.*, to be issuing out of her separate estate, during her life; and in pursuance of all powers and authorities enabling her, she thereby bargained, sold, transferred, set over, ordered, directed, limited, and appointed the rents and profits of the real estates, late of Nicholas Morrell, to which she was entitled for life, or which then were or should thereafter become due to her, to hold the same unto John Carter, his executors, administrators, and assigns, upon trust for securing the said annuity, and the surplus thereof was to be paid to her, Sarah Galwith, or as she should appoint.

By indentures of lease and release and appointment, dated the 23d and 24th of May, 1775, the release made between Nicholas Galwith of the first part, Sarah Galwith of the second part, and John Carter of the third part; Nicholas Galwith, in consideration of 900*l.* paid to him by John Carter, granted, bargained, sold, released, and confirmed, and for the better securing the *re-payment of the said sum of 900*l.*, and in consideration of 5*s.*, Sarah [*147 Galwith did, in pursuance of the power contained in the will, and by virtue thereof and of all other powers enabling her so to do, upon the contingencies and in the events in the said recited will mentioned, direct, limit, and appoint the hereditaments and premises of which Nicholas Morrell died seised, to hold unto and for the use of John Carter, his heirs and assigns for ever, subject to redemption on payment of 900*l.* and interest.

By an indenture, dated 6th November, 1778, made between Nicholas Galwith, of the first part, Sarah Galwith of the second part, and John Carter of the third part, after reciting the will of Nicholas Morrell, dated 13th October, 1756, the indentures, dated 6th January, 1773, and the 23d and 24th May, 1775, and that John Carter had agreed with Sarah and Nicholas Galwith for the absolute purchase of the freehold and inheritance of the hereditaments and premises late of the testator, Nicholas Morrell, for 3360*l.*, of which the said sums of 910*l.* and 900*l.* were to be taken as part; it was witnessed, that in consideration of those two sums, and of the further sum of 1550*l.*, paid by John Carter to Nicholas Galwith and Sarah Galwith, they, Nicholas and Sarah, did remise and release all the provisos contained in the indenture of the 24th May, 1775, for redemption of the hereditaments, and all the right, title, and equity of redemption of them Nicholas and Sarah Galwith, their or either of their heirs, executors or administrators, thereby reserved; and it was thereby further witnessed, that Nicholas Galwith did release, ratify, and confirm; and Sarah Galwith, by virtue of all powers enabling her so to do, did, by that her deed, by her daly sealed and delivered in the presence of three credible witnesses, whose names were thereon endorsed, fully and absolutely direct, limit, and appoint, release,

*148] ratify, and *confirm unto John Carter, his heirs and assigns, the same premises, to hold unto John Carter, his heirs and assigns, to and for their own proper use absolutely for ever; and this indenture contained a covenant on the part of Nicholas Galwith to levy a fine of the premises to the use of John Carter, his heirs and assigns for ever.

The execution of each of the deeds of the 6th of January, 1773, 23d and 24th of May, 1775, and 6th of November, 1778, made by Sarah Galwith, was attested by three witnesses.

In Michaelmas term, 19 G. 3, a fine was levied by Nicholas Galwith, of the aforesaid premises, in pursuance of the covenant contained in the indenture of the 6th of November, 1778.

Nicholas Galwith died without issue, in the lifetime of Sarah Galwith, and there was no other issue of the body of Sarah Galwith then living, nor had she any after-born child.—Sarah Galwith had since died.

The question for the opinion of the court was,

Whether the power of appointment given by the will of Nicholas Morrell, dated 13th October, 1756, to his daughter, Sarah Galwith, was well executed by the deed of the 6th of November, 1778, such deed having been executed by Sarah Galwith in the lifetime of her son Nicholas?

Frere, Serjt., for the plaintiffs. The power was well executed, and the circumstance of Nicholas Galwith being alive at the time does not invalidate the deed. Where a power may be executed on a contingent event it may also be executed before, though the happening of the contingency is necessary to give effect to the execution. Upon this deed Nicholas Galwith and his mother conveyed a good title, subject to a contingency which might defeat it, namely, the *149] birth of issue *subsequently. The point has been decided in *Sclater v. Travel*, 3 Vin. Abr. 427, *Authority G.*; *Countess of Sutherland v. Northmore*, Dickens, 56; which cases have been recognised in *Doe dem. Calkin v. Tomkinson*, 3 Atk. 117.—*Uvedale v. Uvedale*, 2 M. & C. 165, is also an authority for the plaintiff. It is not necessary to contend that Carter took an indefeasible estate; it was his own act, to purchase, subject to a contingency.

Taddy, Serjt., for the defendants. The object of the deviser was to leave his property to his grandchild in a way which might enable him to enjoy the full advantage of it; but if it were sold subject to the very probable contingency of his having issue and surviving his mother, the price to be obtained must necessarily be small. Now, though a power which is given to arise on a contingency may be executed before the contingency, if the time of execution is wholly immaterial and does not affect the intention of the party creating the power, yet it is otherwise where the intention of that party would be frustrated. *Anon. v. Excheq.* 1806, Sugd. on Pow. 273, third edit., 265, second edit.; *M. Adam v. Logan*, 3 Bro. Cha. Cas. 310. The power in the case of *Sclater v. Travel* was very peculiar, and contained the words “*at any time during her life*,” which are not to be found in the present power. In Co. Lit. 112 b, it is laid down, that where there is a devise to A. for life, and that after his decease the estate shall be sold, the sale cannot be made during A.’s life: the passage in Bro. Abr. 236, *Devise*, pl. 31, is to the same effect; and it follows from these authorities that where the time of the execution is material, it cannot be anticipated. The true test for the validity of the execution of a power is to consider *150] the estates created under it as limited by the instrument *which gave the power; but if Carter were to take under Morrell’s will instead of under the power,—instead of taking absolutely as he does by the deed, he would take an estate subject to Nicholas Galwith’s dying without issue, and there being no other issue of Sarah Galwith. This power, therefore, was only itself a contingent power, and not a power to give an estate upon a contingency.

Frere, in reply. In *M. Adam v. Logan* the power was distinctly given to the survivor of two persons: the passage in Bro. Abr. only shows that a sur

living executor may sell; and that in Co. Lit. 112, b, is controverted in note 2, Co. Lit. 113 a. The case in the Exchequer was decided altogether on equitable principles, and does not affect the present question.

The following certificate was afterwards sent:

This case has been argued before us; we have considered the same, and are of opinion that the power of appointment given by the will of Nicholas Morrell, dated the 13th of October, 1756, to his daughter, Sarah Galwith, was well executed by the deed of the 6th of November, 1778, notwithstanding the execution thereof by the said Sarah in the lifetime of her son Nicholas Galwith.

W. D. BEST
J. A. PARK.
J. BURROUGH.

*TITUS FARMER the Elder, and DANIEL FARMER and TITUS FARMER the Younger, Infants, by their next Friend, v. JOSHUA FRANCIS the Elder, JOHN HEMMONS, EDMUND FARMER, JULIA FRANCIS, EDMUND FARMER FRANCIS, JOSHUA FRANCIS the Younger, HENRY FRANCIS, THOMAS FRANCIS, DAVID POLLEY FRANCIS, DANIEL FARMER FRANCIS, and SARAH FARMER. [*151]

Devise to A. for life, remainder to all her children that should be living at her death, equally amongst them if more than one, to be divided share and share alike, when and as they should respectively attain the age of twenty-four, and to their respective heirs, to take as tenants in common, and not as joint tenants:

Held, that A.'s children (seven in number) took a vested interest at her death, as tenants in common.

In pursuance of an order of the vice-chancellor, the following case was settled for the opinion of the Court of Common Pleas:

Edmund Farmer, by his will, dated the 16th of April, 1814, after giving certain specific and pecuniary legacies, and directing his executors to invest such a sum in the funds as would produce the yearly sum of 52*l.*, and to pay the same by weekly sums to his son Edmund, for his life, and at his decease to apply the same for the maintenance and education of the child or children of the said Edmund, until the age of twenty-four years, and then to divide the principal amongst them; and after giving 1000*l.* in the three per cent. consolidated bank annuities, in trust, to apply the interest in the maintenance of his grandsons, Daniel and Titus Farmer, until the age of twenty-four, and then to divide the principal between them, gave and disposed of the residue of his estate and effects as follows: "and as to all the rest, residue, and remainder of my estate and effects, wheresoever and of what nature or kind soever the same shall or may consist at the time of my decease, both real and personal, as well in possession as reversion, remainder, or expectancy, I do hereby give, devise, and bequeath the same and every part thereof unto my wife [*152] Lucy, and Joshua Francis and John Hemmons, to take and hold the same and every part thereof unto my said wife, and the said Joshua Francis, and John Hemmons, their heirs, executors, administrators, and assigns for ever, upon trust, nevertheless, and to and for the persons, uses, intents, and purposes following, viz., upon trust, as to the rents, dividends, interest, use, produce, and profits thereof, for the use and benefit of my said wife, for and during the term of her natural life, and from and after her decease, upon trust for, and I do hereby give, devise, and bequeath the rents, dividends, and interest, use, produce, and profits of the said last-mentioned trust estate, funds, and effects, unto my daughter Mary Francis, for her natural life, to and for her own sole, separate, and peculiar use, not subject or liable to the debts, receipts, or engagements of her present or any after-taken husband or husbands, and over which I will and direct he or they shall have no power or control whatsoever.

but that the receipt of my said daughter alone, notwithstanding her coverture, shall be at all times a good and sufficient discharge to the person or persons paying the same; and from and after the decease of them my said wife and daughter, upon trust for, and I do hereby give, devise, and bequeath the said residuary trust estates, hereditaments, and premises, and the principal of the said residuary trust fund property, and effects, unto and amongst all and every the lawful issue, child or children of my said daughter Mary Francis, as shall be living at the time of the decease of the survivor of them my said wife and daughter, equally amongst them, if more than one, *to be divided* share and share alike, *when and as* they shall respectively attain the age of twenty-four years and to their respective heirs, executors, administrators, and assigns for ever, to take as tenants in common and not as joint tenants, and if only one, then the whole thereof to such only or *surviving child of my said daughter Mary Francis, his or her heirs, executors, administrators, or assigns for ever, upon attaining the said age. But in case there shall be no such issue, child or children of my said daughter, Mary Francis, living at the time of the decease of the survivor of them my said wife or daughter, or being such, all shall die without lawful issue, under the said age of twenty-four years, then upon trust for and I do hereby give and bequeath the said residuary trust estates, hereditaments, and premises, residuary trust fund property, and effects, unto my sons Edmund and Thus Farmer, equally to be divided between them, share and share alike, and to their several and respective heirs, executors, administrators, and assigns for ever, to take as tenants in common and not as joint tenants, and to and for no other use, intent, or purpose whatsoever."

The testator died on the 29th April, 1814, leaving Edmund, his eldest son and heir at law him surviving, who died on the 25th of October, 1817, leaving Edmund Farmer, his eldest son and heir at law him surviving, who then became the heir at law of the testator.

On the death of the testator his widow entered into the possession of the rents and profits of his real and personal estate, and received the same until her death, in January, 1818, when the testator's daughter, Mary Francis, entered into possession of the rents and profits, and received them until her death, in November, 1821.

Mary Francis left seven children, viz., Julia, Edmund Farmer, Joshua, Henry, Thomas, David Polley, and Daniel Farmer Francis, the youngest of whom was then of the age of four years and upwards, having been born in September, 1817.

The questions for the opinion of the court were, whether the children of the testator's daughter Mary Francis took any, and what interests in the real estate of the testator, by virtue of the residuary devise in his will? or whether Edmund Farmer, as heir at law of the *testator, or what other person or persons, was or were entitled to such real estates?

And if the court should be of opinion that the trustees took the legal fee under the devise, then, whether the children of Mary Francis would have taken any and what interests in the real estates of the testator by virtue of the said residuary devise, in case it had been made without the introduction of trustees? or whether the heir at law of the testator, or what other person or persons, would have been entitled to the said real estates?

Bosanquet, Serjt., for the plaintiffs. The trustees took the legal estate, and the children of Mary Francis a vested interest, as tenants in common. This being a devise of residuary property, it is clear the deviser did not intend any thing to go to the heir; and the court will therefore construe it as favourably as possible for the devisees. If the children took no interest till they were twenty-four, the devise would be void, as too remote; but it was clearly the testator's intention to benefit the family of Mary Francis, and that they should take a vested interest, under a condition subsequent, that the money should not

be divided till they attained twenty-four. The property is *given* to such as should be living at the decease of the survivor of two persons; (Mary Francis and the devisor's wife)—not, to such as should be then living, and should also attain the age of twenty-four; but having been given absolutely, as is just described, it is to be *divided*, when and as they attain twenty-four. From *Boraston's* case, 3 Rep. 19, to *Denn d. Roake v. Nowell*, 1 M. & S. 327, such a condition has been esteemed a condition subsequent. *Doe d. Wheedon v. Lea*, 3 T. R. 41; *Broomfield v. Crowder*, 1 N. R. 313; *Doe d. Hurst v. Moore*, 14 East, 601; *Edwards v. Hammond*, 3 Lev. 132.

**Pell*, Serjt., *contra*. The devise to the children is void, as being too remote, the circumstance that the youngest child was four years old at [*155] the time of the death of Mary Francis not affecting the case, as the will must be construed with reference to the state of things at the time of making it. The principle laid down in the cases cited may be admitted to be correct; but those were cases in which the interest passed to distinct individuals, and not to a whole class of persons, as here. The devise here being to a class of persons, it is clear that the division proposed by the devisor could not be made, nor his intention carried into effect, till time should have shown how many of that class would attain twenty-four. *Leake v. Robinson*, 2 Merivale, 363, and *Phipps v. Kelynge*, Fearn, *Cont. Rem.* 616, edit. ult., are in point for the defendant.

Bosanquet, in reply. *Leake v. Robinson* and *Phipps v. Kelynge* were decisions upon questions touching personal property, the rules with regard to which are not applicable to cases of real property.

The following certificate was afterwards sent:

This case has been argued before us; we have considered the same, and are of opinion, that Julia Francis, Edmund Farmer Francis, Joshua Francis the younger, Henry Francis, Thomas Francis, David Polley Francis, and Daniel Farmer Francis, the children of the testator's daughter Mary Francis, took equitable estates in fee as tenants in common, in the real estates of the testator by virtue of the residuary clause in his said will contained.

We are of opinion that the said children of Mary Francis would have taken legal estates in fee as tenants in common, by virtue of the said residuary devise, in *case it had been made without the introduction of trustees, as stated [*156] in this case.

W. D. BEST.

J. A. PARK.

J. BURROUGH.

HALL v. SMITH, ARNOLD, HAINES, NORTON, KIMBERLY, and HOLLIER.

BILLINGTON v. DITTO.

Clerks of commissioners entrusted with the conduct of public works, are not liable in damages for an injury occasioned by the negligence of artificers employed under their authority.

THE plaintiff, Hall, who was apprenticed to Billington, declared that on the 19th of December, 1822, the defendants dug a deep ditch in Navigation street, Birmingham, placed a quantity of rubbish near the same, and left the same without any guard, fence, light, or signal on the night of that day; and that the plaintiff not knowing thereof, whilst riding across the same street fell into the ditch with great force, broke his thigh, and injured his horse.

At the trial before GARROW, B., Warwick Summer assizes, 1823, it appeared, that in opening the ditch in question the defendants Smith, Arnold, and Haines, had acted as clerks to certain commissioners for lighting, paving, and watching the town of Birmingham: Norton was a surveyor, Kimberly a contractor, employed by them, and Hollier a labourer employed by Kimberly. The plain-

tiff's disaster having been established, the jury, under the direction of the learned baron, found a verdict of 50*l.* damages against all the defendants except Hollier, who was actually at work in the ditch at the time the accident happened. By s. 87 of the Birmingham street act, 52 G. 3, c. 113, the commissioners are to sue and be sued in the name of their treasurer or clerks, who are to be reimbursed.

**Pell*, Serjt., in Michaelmas term last, obtained a rule nisi to set aside [157] this verdict, and enter a nonsuit, or have a new trial, on the ground that the commissioners, and those acting under them, being in the execution of a public duty imposed on them by the legislature, were not responsible in damages unless where the injury complained of was occasioned by proceedings under their immediate direction and superintendence.

Vaughan, Serjt., showed cause. The commissioners are responsible, though in the exercise of a public duty. Unless they are so, the public may be without remedy for any mischief occasioned by the grossest negligence; for the agents and servants of the commissioners may be, and generally are, without property. Commissioners of sewers have been holden liable for negligence in the exercise of their duty. *Jones v. Bird*, 5 B. & A. 837; *Matthews v. West London Water-works Company*, 3 Campb. 403.

[*Best*, C. J. That company was a corporation acting for its own benefit.] In *Bush v. Steinman*, 1 B. & P. 404, the owner of a house who had ordered repairs, was holden liable for the effects of a nuisance occasioned by the repairs, though the person who occasioned the nuisance was the servant of a mason who had been employed by the party who undertook the repairs.

In *Harris v. Baker*, 4 M. & S. 27, the trustees of a public road were holden not liable; but that was a case of mere non-feasance, not of misfeasance; and it was not clear that they were bound to do that which was required of them.

Pell was heard in support of his rule; and the court took time to consider.

**Best*, C. J. This was an action on the case for negligently leaving [158] a ditch or tunnel open, by reason of which the plaintiff fell into it and was injured. The jury found a verdict for Hollier, and against all the other defendants. As to Norton and Kimberly, it is admitted that the verdict found against them must stand. The question to be decided by us, is, whether Smith, Arnold, and Haines are to have a verdict entered for them. These three persons are clerks to the commissioners for paving, lighting, watching, cleansing, and otherwise improving the town of Birmingham under the authority of an act of 52 G. 3. The eighty-seventh section of that act directs, "that the commissioners appointed under the act shall and may sue and be sued in the name or names of the treasurer or treasurers, clerk or clerks, for the time being." The same section provides, that the treasurers or clerks shall be reimbursed out of the moneys to be received by virtue of the act, all such costs, damages, or expenses as they shall be put to by reason of their being so made plaintiffs or defendants.

This action is not maintainable against these defendants, unless (if the act had contained no such clause as that which I have just stated,) it could have been supported against the commissioners. It was not disputed that the commissioners were authorized by the act to order the tunnel to be made which occasioned the injury to the plaintiff. No negligence was imputed to the commissioners themselves. They had ordered the tunnel to be made, and left the making of it to the defendants, Norton and Kimberly, the former of whom was the surveyor, and the latter the undertaker of the work. The accident happened to the plaintiff from these persons not putting up rails, and not leaving lights during the night to prevent persons, passing along the road in which the tunnel was made, from falling into it. These commissioners are charged with the [159] execution of a public duty, for the performance of which they receive no emolument or advantage. They must employ such persons as Nor-

ton and Kimberly to do the works which the act of parliament orders to be done, and the commissioners cannot be expected continually to watch such persons whilst so employed. We think, under these circumstances, that the commissioners are not responsible for the accident that has happened, and that the action cannot be maintained against their clerks; but the party injured must have his remedy against the agents of the commissioners, by whose negligence it was occasioned. It may be observed, that the clerks are to be reimbursed out of the money to be raised by the act, all costs and damages they may be put to by reason of their being made plaintiffs or defendants; but suppose the funds raised under the act should be deficient, then these clerks must pay such damages and costs out of their own funds, and it would be difficult to find any persons from whom the clerks could obtain the repayment of what they should have paid. If commissioners, under an act of parliament, order something to be done which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action, but they are not answerable for the misconduct of such as they are obliged to employ. If the doctrine of *respondeat superior* were applied to such commissioners, who would be hardy enough to undertake any of those various offices by which much valuable, yet unpaid, service is rendered to the country? Our public roads are formed and kept in repair, our towns paved and lighted, our lands drained and protected from inundation,—our internal navigation has been improved,—ports have been made and are kept in order,—and many other public works are conducted by commissioners who act spontaneously. Such commissioners will act no longer if they are to *make amends from their own fortunes for the conduct of such as must be employed under them. It would be much better that an individual [*160 injured by the act of an agent should endure an injury unredressed, than that the zeal of the most useful members of the community should be checked by subjecting them to a responsibility for agents from whose services they derive no benefit, and who are seldom under the immediate control of their employers whilst they are employed on the works they are ordered to do. The commissioners, taking the advice of their surveyors and engineers, are to direct what tunnels or other works are to be made. Few commissioners know how such works should be executed; they ought not, therefore, to be answerable for an imperfect execution of them, nor can it be expected that they shall attend day by day to see that proper precautions are taken against accidents, or get up in the night to see that lights are burned to warn passengers of the danger from temporary obstructions in the roads. If by taking their office of commissioners, they have not undertaken the performance of these duties, with what justice can they be charged with the consequences of the neglect of them? The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it. This maxim was first applied to public officers by the statute of Westminster 2, c. 11, from the words of which statute it is taken. "*Si custos gaolæ non habeat per quod iusticietur vel unde solvat, respondeat superior suus qui custodiam hujusmodi gaolæ sibi commisit.*"

The terms of the stat. of Westm. the second embrace only those who delegate the keeping of jails to deputies, and were intended only, as Lord Coke tells us, 2 Inst. 382, to *apply "to those who having the custody of [*161 jails of freehold or inheritance commit the same to another that is not sufficient." The principle of the statute has, however, since been extended to sheriffs, who are responsible for their under-sheriffs and bailiffs, but has not been applied to any other public officer. Although the office of sheriffs be now a burthensome one, yet they are entitled to poundage, and other fees, for acts done by their officers, which in old time might be a just equivalent for

their responsibility. In *Bowcher v. Noidstrom*, 1 Taunt. 568, LAWRENCE, J., mentions the case of the captain of the Russell man of war, who was held answerable for the act of one of the lieutenants, who had the command of the watch, in running down an Indiaman, whilst the captain was asleep in his cabin. When or by whom that case was decided I do not know; but it is supported by no other decision that I am aware of, and its authority is shaken by the judgment of the case in which it is cited. The actions in the cases of *Leader v. Mozon*, 2 Bl. 924; *Jones v. Bird*, 5 B. & A. 844, and *The Plate Glass Company v. Meredith*, 4 T. R. 794, were not brought against the commissioners, but against those who did the acts complained of. In the latter case I adverted to that circumstance as distinguishing it from *Sutton v. Clarke*, 1 Marsh. 429. If the counsel who advised the bringing these actions had thought they could have been maintained against the commissioners who gave the orders for the works that occasioned the injuries of the plaintiffs, the commissioners would have been included. *Schinotti v. Bumstead*, 6 T. R. 646, is distinguishable from this case; there the negligence was brought home to the commissioners of the lottery, who were the defendants, and they were com-

*162] pensated for their services and were bound to pay *due attention to their duty. The commissioners here had authority to make the trench which occasioned the damage to the plaintiff. The *Plate Glass Company v. Meredith*, already referred to, shows that no action could be maintained against them for what they are authorized to do, although an individual sustain an injury from what has been done. The passage into the plaintiff's premises in that case was rendered impassable with carts, by the raising of pavement by the order of the commissioners. Lord KENYON says, "If this action could be maintained, every turnpike act, paving act, and navigation act would give rise to an infinity of actions. The parties are without remedy, provided the commissioners do not exceed their jurisdiction." In *Sutton v. Clarke* the defendant, as a trustee under a turnpike act, who was duly authorized to make a drain, had ordered such drain to be cut in an improper manner; he had, however, given this order after having taken the best advice that could be obtained. Lord C. J. GIBBS considered that circumstance as distinguishing the case from that of the *British Plate Glass Company*, where what was done could not be done in any other manner than that in which it was done; but still his lordship and the rest of the court held, that as the defendant acted according to the best of his judgment, and with the best advice, he was not answerable for the injury, and he added, "this case is perfectly unlike that of an individual who makes an improvement in his own land, from which an injury accrues to another; such person must answer for the injury, because he was acting for his own benefit." In *Harris and Cross v. Baker*, 4 M. & S. 27, the clerk to commissioners for making a road, under an act which contained a clause directing actions to be brought against such clerk for acts done by the trustees, was holden not to be liable to an action for an injury sustained in consequence of *163] *heaps of dirt being left by the side of the road, and no lights being placed to enable persons to avoid such heaps. In this case there was, as in that now before us, great negligence in those employed by the trustees.

From these cases I collect that the law recognises the principles which I ventured to state were founded in sound policy and justice, and that no action can be maintained against a man acting gratuitously for the public, for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with due care and attention, and that such a person is not answerable for the negligent execution of an order properly given. We are of opinion that a verdict must be entered for Smith, Arnold, and Haines.

Verdict entered accordingly.

In the Matter of the FLEET Prison.

IT having been represented to this court, that many of the houses within the rules of the Fleet prison have become greatly decayed and unfit for habitation by such persons as generally obtain the benefit of the said rules, and which rules are at present so confined in space as to render a residence in some parts of the same unhealthy, and also that there is no place of public worship within the same (except the prison chapel.) Now, upon hearing the report of the warden of the said prison made thereon, it is therefore ordered, that from and after the last day of this present Easter term the rules of the said prison shall be comprised within the following bounds, that is to say, from the gate of the said prison in Fleet-market, southwards along the east side of Fleet-market and Bridge-street, to the end of *Chatham-place; then crossing the road, [*164 returning northward along Chatham-place to William-street; and westward, along William-street; northward, along Water-street; westward, along Crown-court; northward, up Dorset-street, along Salisbury-square and Salisbury-court to Fleet-street; along Fleet street from Salisbury-court and Shoe-lane to the end of Ludgate-hill and Bridge-street, including both sides of the way in each of the said streets, place, courts, and square, except Fleet-market; and from the said gate, northward, along the east side of Fleet-market to Fleet-lane, up Fleet-lane eastward, to the Old-bailey; along the Old-bailey, northward, to Ludgate-hill, up Ludgate-hill and Ludgate-street, to the eastward, to St. Paul's Churchyard, and from thence westward, down Ludgate-street and Ludgate-hill, to the corner of Bridge-street, including both sides of the way along the streets, lane, and places last mentioned, and including the two churches of St. Bride's, Fleet-street, and St. Martin, Ludgate, and the several houses in the streets, lanes, courts, alleys, and places within the boundaries before described, except Ave-Maria-lane, Creed-lane, and Blackfriars-gateway, on Ludgate-hill, which said last mentioned lanes and gateway shall not be deemed any part of the said rules.

W. D. BEST.
J. A. PARK.
J. BURROUGH.

MEMORANDUM.

Mr. Justice RICHARDSON was prevented by ill health from attending in court during the whole of this term.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS

AND

OTHER COURTS,

IN

Trinity Term,

IN THE FIFTH YEAR OF THE REIGN OF GEORGE IV.

*165]

*MEMORANDUM.

In this term *Stephen Gaselee, William St. Julien Arason, and Robert Spankie*, of the Inner Temple, and *John Adams*, of the Middle Temple, Esquires, Barristers at Law, were called to the degree of Serjeant, and gave rings, with the motto "*Bonis legibus, judiciis gravibus.*"

Mr. Justice RICHARDSON having, in the vacation preceding this term, resigned, in consequence of ill health, Mr. Serjt. *Gaselee* was appointed a Pusine Judge of this Court in his stead, and took his seat accordingly, on the 5th day of July.

*166]

EVERETT and Others v. EYRE.

In the condition of a bond it was recited, that plaintiffs were shareholders in the Spring Water Company,—that 30 per cent. had been paid by instalments upon the shares,—that Plaintiffs had agreed to pay up the remaining instalments forthwith,—that M., W., and H. had agreed to purchase these shares, and that the price was to be secured by the joint bond of M. and the defendant: the condition of the bond was, that M. and the defendant should pay the plaintiffs the amount of the shares, together with interest thereon from the time of the *advance or payment thereof* by the plaintiffs.

The plaintiffs being also shareholders and treasurers of the Stone Pipe Company, which Company was indebted to them 12,000*l.*,—prevailed on the Spring Water Company to purchase the pipes of the Stone Pipe Company; and to effect payment for the pipes, the plaintiffs, without any calls having been made, entered up in their books as paid, the remaining 70 per cent. due on the Spring Water Company's shares, and having made this entry, paid the Stone Pipe Company, deducting and transferring to their own account, enough to discharge the debts due from the Stone Pipe Company to themselves.

In an action brought against the defendant for the sum claimed in respect of the sale of the shares of the Spring Water Company, the jury having found for the plaintiffs, the court refused to grant a new trial, holding that the plaintiffs had advanced or paid the money for the shares, within the terms of the condition of the bond.

This was an action on a bond, dated September 10th, 1814, the condition of which recited, that the plaintiffs were possessed of sixty-six shares of 100*l.*

each, in the Bayswater Spring Water Company, upon which shares 30 per cent. had then been paid; that the plaintiffs had agreed to pay up and complete the remaining instalments forthwith: that George Boulton Mainwaring, Henry Wright, and Samuel Hill had agreed to purchase these shares for 6600*l.*, to be secured to be paid to the plaintiffs, within four years from the 1st of June, 1814, together with interest, for all moneys which should have been advanced by the plaintiffs, in respect of such shares, from the time they should be advanced: and also, that it had been agreed between Mainwaring, Wright, Hill, and the plaintiffs, that twenty-two of the shares should become the property of Mainwaring; and that the sum of 2200*l.* being the purchase-money thereof, with interest, should be secured by the joint bond of Mainwaring and the defendant.

*The condition itself was, that if Mainwaring or the defendant should on the 1st of June, 1818, pay the plaintiffs the sum of 2200*l.*, together with interest in the mean time upon the 2200*l.*, from the time of the advance or payment thereof by the plaintiffs, such interest to be paid on the 1st of June and the 1st of December in every year; then the bond was to be void. Breach, non-payment by defendant or Mainwaring of the 2200*l.* [*167]

The defendant pleaded, among other pleas (sixthly) that the sum of 2200*l.* was never advanced by the plaintiffs, or either of them, for instalments, in respect of the supposed shares in the condition of the bond mentioned.

The plaintiffs replied, that they had paid this sum in respect of the instalments; and upon this issue was joined.

At the trial before BURROUGH, J., London sittings after Hilary term, the case appeared to be as follows:

The plaintiffs, who formed the banking-house of Everett and Co., were interested, as shareholders, in a company called the Stone Pipe Company, to which they were also treasurers. To this company they had made considerable advances, which remained unliquidated, to the amount of 12,000*l.* They then joined a company intended to be formed for the purpose of supplying London, Westminster, and their environs, with spring water, called the Bayswater Spring Water Company, to which they also became treasurers. The plaintiffs were possessed of sixty-six shares of 100*l.* each in the Spring Water Company, which they subsequently sold out to different individuals, among whom Mainwaring agreed to become a purchaser of twenty-two shares, to secure payment for which the defendant became his surety. Both the companies ultimately failed; but long before that event took place, the plaintiffs, (who had not then paid up on regular calls more than *30*l.* on each share they [*168 held] prevailed on the Spring Water Company to purchase the pipes of the Stone Pipe Company, which they did to the amount of 23,000*l.* In order to effect payment for these pipes, the plaintiffs, without any calls having been made, entered up in their books, as paid, the remaining 70 per cent. due on the Spring Water Company's shares, which originally belonged to themselves, and having made this entry, proceeded to pay the Stone Pipe Company, deducting and transferring to their own account enough to discharge the debt due from the Stone Pipe Company to themselves. Mainwaring not having paid up his shares and having quitted the country, the plaintiffs came upon the defendant as his surety. The defendant contended that these two companies were mere speculations or bubbles, and that the plaintiffs had not in reality paid up more than 30*l.* upon each of their shares, to which extent only he admitted himself to be liable. The learned judge intimated his opinion, that the instalments had been paid, and the jury returned a verdict for the plaintiffs to the full amount claimed. A rule having been obtained in the course of the preceding term to set aside that verdict, and have a new trial, or to reduce the verdict 70 per cent., it now came on for argument, when the court called on

Pell, Serjt., (and Cross, Serjt., was with him,) to support the rule.

They contended, that there having been no calls in respect of the shares

after the payment of the 30 per cent., the plaintiffs merely entering up in their books a charge of 70 per cent. to the account of the concern, did not constitute a payment in respect of the instalments within the terms of the issue which
 *169] had been sent down for trial; and that it ought to have been left *to the jury to say, whether the 70 per cent. had been paid *bonâ fide* for calls in the general way of the concern, or whether the entry in the books had been a mere pretence to enable the plaintiffs to secure their own debt.

BEST, C. J. I am of opinion that the case was properly left to the jury, and that the learned judge was warranted in the opinion he expressed. The real question was short and simple, and the evidence was all on one side. The action was brought on a bond, the condition of which recited, "that 30 per cent. had already been paid upon the shares of the Bayswater Spring Water Company, and that the plaintiffs had agreed to pay up and complete the remaining instalments *forthwith*;"—this is a complete answer to the objection that the instalments were never called for;—then the condition of the bond was, "that if Mainwaring or the defendant should, on the 1st of June, 1818, pay the plaintiffs the sum of 2200*l.*, together with interest in the mean time, from the time of the advance or payment thereof by the plaintiffs, the bond was to be void:"—surely the defendant was interested that the plaintiffs should not wait for a call, but should pay the instalments *forthwith*, and prevent the accumulation of interest;—Then what is the sixth plea? "that the sum of 2200*l.* was never advanced by the plaintiffs, or either of them, for instalments, in respect of the supposed shares, in the condition of the bond mentioned, or otherwise." On this the replication takes issue, alleging that the money has been paid in respect of the instalments. That was the only question for the jury to try, and the verdict is according to the only evidence in the cause. The puzzle has arisen from the plaintiffs having shares in two companies; but the bargain they made with the Stone Pipe Company, whether improvident or otherwise, has
 *170] nothing to do with the question. The question is, whether the money has been paid; if it has, it is immaterial whence the money came, and the plaintiffs are entitled to their verdict.

PARK, J. I think the question was properly left to the jury, and if so, the verdict was well warranted by the evidence in the cause. As to the argument that there was no call for the instalments, the plaintiffs are stated, in the very instrument which the defendant has executed, to have been under engagement to pay them *forthwith*. The rule, therefore, which has been obtained on the part of the defendant must be discharged.

BURROUGH, J., concurring, the rule was

Discharged accordingly.

FROMONT v. COUPLAND.

Plaintiff and defendant had been engaged in running a coach from B. to L., plaintiff finding horses for one part of the road, defendant for another; and the profits of each party were calculated according to the number of miles covered by his own horses: the plaintiff received the fares, and rendered an account thereof to the defendant every week:

Held, that plaintiff and defendant were partners in this concern, and that in an action by the plaintiff against the defendant upon a separate transaction, the defendant could not set off a balance which had been declared in his favour upon these weekly accounts.

THE plaintiff sought to recover 200*l.* for the rent of stables occupied by the defendant. At the trial before BEST, C. J., London sittings after Easter term, the defence set up was, that the parties in the suit had formerly been engaged in running a coach from Bath to London, the plaintiff finding horses for one part of the road, and the defendant for another, and the profits of each party
 *171] were calculated according to the number of miles covered by his own horses. The plaintiff received the fares, and rendered an account thereof to the defendant every week. Upon this weekly account there was a balance

due to the defendant of 256*l*. It did not appear, however, that any final account had been stated, or that the plaintiff had made any promise to pay the balance in question.

A verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit.

Pell, Serjt., now moved accordingly, and urged, that the set-off ought to be allowed; first, because the transaction between the parties as to the Bath coach did not amount to a partnership:—as between themselves they had separate departments and separate interests, and though with reference to travellers they might be jointly liable, they must be sued separately by the tradesmen who supplied each: *Barton v. Hanson*, 2 Taunt. 49: secondly, because, even supposing them to have been partners, there was an adjustment of the account, upon which either partner might have sued the other, even though there had been no special promise to pay: *Smith v. Barrow*, 2 T. R. 476; *Rackstraw v. Imber*, Holt, N. P. C. 368.

BEST, C. J. I gave the defendant leave to move, because I was told there were decisions in his favour, but none of those which have been cited apply to his case. In reason and justice, the sum alleged to be due to the defendant can be no set-off in this action: according to the case of *Barton v. Hanson*, these parties are partners, though no authority was requisite to prove that, because both are engaged in carrying the same passengers; they divide the profits, and are answerable *to the public jointly. Undoubtedly, if after a partner-ship has been dissolved, the parties adjust a balance and one of them [*172 makes a promise to pay, there arises on that a moral consideration which may be the subject of an action. The case in Holt perhaps goes somewhat further than this; but it is only a nisi prius decision, and might, upon further consideration, have been determined otherwise. However, it is enough to say, that the opinion of *BULLER*, J., in *Smith v. Barrow*, is decisive of the present case. He there says, "One partner cannot recover a sum of money received by the other, unless on a balance struck, that sum be found due to him alone." So that, before there can be an action or a set-off in respect of a claim arising out of a partnership account, there must be a final balance struck. The same doctrine is laid down in *Foster v. Allanson*, 2 T. R. 479. It has been contended that a balance was struck in the present case. But I think not; a balance during the continuance of the concern will not do; it must be a final balance of all the partnership accounts; but there has been nothing like that here, and we might be doing great injustice if we were to allow the set-off. The balance in question was only upon a weekly account, and upon an annual or final account the result might have been very different. Upon the balance thus struck, no action could have been maintained, and unless an action could have been maintained, the set-off cannot be allowed.

PARK, J. I have no doubt that the plaintiff is entitled to recover. It has been admitted that no claim can be allowed as a set-off, unless it could also be recoverable in an action, and that an action will not lie for a partner on a partnership account, unless a balance has been adjusted. Now, the transaction between these *parties was a partnership, and an account was rendered [*173 from week to week, but no final balance was struck so often, and it is a final balance alone that can be allowed as a set-off, and that only when there has been a promise to pay it; it is true, that in *Smith v. Barrow*, *BULLER*, J., did not mention the promise to pay, but he relied on it in other instances; and in *Foster v. Allanson*, he said there must not only be a final settlement of the account, but also a promise to pay; in *Moravia v. Levy*, 2 T. R. 483, n., there was an express promise, and though in *Rackstraw v. Imber*, *GIBBS*, C. J., is reported to have holden that a promise was not necessary, that is a nisi prius decision which cannot outweigh the authority of the two others. I think, therefore, the rule which has been prayed cannot be granted.

BURROUGH, J. The weekly accounts were only preparatory to a final account, and are not sufficiently conclusive to form the subject of a set-off.

Rule refused.

BURTON v. HUGHES and Others.

K., the owner of furniture, lent it to plaintiff under the terms of a written agreement; plaintiff placed it in a house occupied by the wife of C., a bankrupt. C.'s assignees having seized the furniture: *Held*, that plaintiff might recover it in trover, without producing the agreement.

TROVER for certain articles of furniture seized by the defendants under a commission of bankrupt against Robert Cross. At the trial before **BAYLEY, J.**, York Lent assizes, 1824, Kitchen, a dealer in furniture, proved that he was *174] owner of the furniture in question, *which he had lent to the plaintiff under the terms of a written agreement, and that the plaintiff had placed it in a house occupied by the bankrupt's wife.

The agreement between Kitchen and the plaintiff was called for, but could not be produced for want of a stamp.

On the part of the defendants, it was then contended that the plaintiff must be nonsuited; that at the time of the taking he had neither the property nor the possession of these goods, but only an alleged interest under an agreement; of which interest, as the agreement could not be produced, there was no evidence whatever; that in order to support trover, the plaintiff must prove property, special interest, or actual possession, even though that possession should be tortious as against a third person. A verdict having been found for the plaintiff,

Cross, Serjt., in the last term, upon the grounds urged at the trial, obtained a rule nisi to set aside the verdict and enter a nonsuit.

Bosanquet, Serjt., now showed cause. It appears from Kitchen's testimony that the plaintiff had a qualified interest of some kind in the goods, and that was sufficient to enable him to maintain the action. It is true, that what was the precise nature of that interest, or upon what terms it was acquired and retained could only have been proved by the written agreement; but the existence of some kind of interest having been established, the precise nature of it, or the terms upon which it was acquired, were immaterial to the support of this action, *Sutton v. Buck*, 2 Taunt. 302.

*175] **Cross**. The qualified interest having been obtained *under a written agreement, could not be proved except by the production of that agreement duly stamped.

BEST, C. J. If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is, whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover. In that case a party, whose title was not completed by registry or any regular conveyance, sued in trover to recover a ship of which he had been possessed; registry was absolutely necessary to give him a title, and yet it was holden he might recover against a wrong-doer. **MANSFIELD, C. J.**, says, "Suppose a man gives me a ship, without a regular compliance with the register act, and I fit it out at 500*l.* expense, see what a doctrine it is that another man may take it from me and I have no remedy. The only doubt on the case, I think, arises from the register act, lest, if we should decide that any property passed by the transfer, it should militate against that act, and I have never been able entirely to free my mind from that doubt; but at present I think that, on the circumstances, the plaintiff might maintain trover." **LAWRENCE, J.**, says, "There is

enough property in this plaintiff to enable him to maintain trover against a wrong-doer; and although it has been urged that the contract is void, with respect to the rights of third persons, as well as between the parties, yet, as far as regards the possession, it is good as against all, except the vendor himself." It is impossible to distinguish that case from the present: but it has been *contended here, that the defendants were not wrong-doers;—certainly not, in taking the effects of the bankrupts, but they are wrong-doers in taking the effects of a third person; they had no right to take goods belonging to the plaintiff, which were clearly distinguishable from any the bankrupt ever had. [*176]

PARK, J. If this had been a question between Kitchen and the bankrupt, it might have borne a totally different complexion; but whether Mrs. Croes was to live in the house, or Burton, was altogether immaterial, as against the defendants, and the case which has been referred to is much stronger than the present. There it was holden, that possession of a ship under a transfer, void for non-compliance with the register act, is a sufficient title in trover against a stranger for parts of the ship, being wrecked. Admitting that the defendants were not wrong-doers, at all events they were strangers, and possession is sufficient to enable a party to maintain trover against a stranger. What CHAMBER, J., says, is very material. "The plaintiff has possession under the rightful owner, and that is sufficient against a person having no colour." (Here the plaintiff was let into possession by Kitchen, the rightful owner.) "An agister, &c., a carrier, a factor, may bring trover; even a general bailment will suffice, without being made for any special purpose, but only for the benefit of the rightful owner." It was immaterial how the plaintiff came into possession, but as there was no dispute between him and Kitchen the verdict must stand.

BURROUGH, J., concurring, the rule was

Discharged.

*BRASSINGTON and Others v. AULT.

[*177]

Three executors ordered goods to be sold as the goods of their testator. They afterwards sued for the amount, without styling themselves executors, and without joining a fourth executor, who was named in the will: *Held*, that they might recover.

THE plaintiffs sued to recover the value of timber sold and delivered to the defendant.

At the trial before PARK, J., last Stafford assizes, it appeared that the plaintiffs, though they had not sued as executors, were three of the executors of one Willcock, who had appointed four executors in his will; and that one of the plaintiffs had authorized an auctioneer to sell the timber in question, as the property of Willcock, deceased. A verdict having been found for the plaintiffs, *Peake*, Serjt., moved to enter a nonsuit instead, on the ground that all the four executors ought to have joined in this action.

Vaughan, Serjt., who was to have shown cause, was stopped by the court, and *Peake* was now called on to support his rule. He contended that the auctioneer had been authorized to sell the timber as the timber of the deceased, and it was clear law, that where several executors were named in a will all must join in an action, lest any who were omitted should afterwards come in and sue. It was true that, generally speaking, a vendee could not dispute the title of a party who was in possession at the time of the sale; but the auctioneer having been ordered to sell the timber as the timber of the deceased, he acted with reference to the executor's title, and all of them ought to have joined in the action. *Webster v. Spencer*, 3 B. & A. 360.

BEST, C. J. The case which has been referred to is distinguishable from the present. In that case the *plaintiffs declared as executors, and when they do that, all (as *ABBOTT*, C. J., and *HOLROYD*, J., said) must join. [*178]

But that expression was referable to the form of action, which was an action expressly by executors; in such a case it is clear that all must join, because they derive their interest under the will, not under the probate, and the right to sue is equal in all: but where the management is left with three, and those three enter into a contract, they may sue alone, without styling themselves executors. It is not material how they came by the property, but how they have disposed of it: if they alone made the contract, they alone ought to sue; that is the short ground on which I proceed, though it might have been otherwise if they had declared as executors.

PARK, J. It would be impossible to question the rule, that in an action by executors, all the executors ought to be joined, because the law has been so from the earliest time; and it has been laid down that even an infant executor must be named. But in the present case the order to sell was given by three persons; nothing passed to show that they were acting in a representative character; and those three persons having sued on their contract, the defendant could not have set off any debt due from the testator to him. The decision of the King's Bench, therefore, which has been cited, does not apply, for in that case the parties expressly sued as executors. The present rule must be
Discharged.

*179]

*HARRINGTON v. FRY.

A party who takes a share in a ship under a conveyance void for want of conformity with the provisions of the registry acts, is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as owner.

THIS was an action to recover the price of stores furnished to a vessel called the *Queen Elizabeth*.

At the trial before **BEST, C. J.**, London sittings after last term, it appeared that the goods had been ordered by *Welsford*, a part owner of the vessel, on his own account and that of the owners; but he did not name the defendant as an owner, nor did the plaintiff ever hear of him as an owner till the commencement of this action. In order, however, to connect him with the ship, two letters were put in from the defendant to *Welsford's* brother, in which he complained of being called on for expenses without having had any account of them; regretted that the concern had turned out ill, and desired that his share might be sold or transferred for a debt of 64*l.* 1*9s.* 4*d.*, and in order to exonerate him from all former debts.

On the part of the defendant it appeared, that *Welsford*, who was a bankrupt, had made a bill of sale of a share in this vessel, in 1816, to defendant, but that the bill of sale only recited an old register of the vessel, granted at the port of *Exeter*, in 1812, whereas, the vessel had, in 1815, been registered anew in the port of *London*, and the register at *Exeter* had been cancelled. No copy of this bill of sale had been delivered to the custom-house in *London*, nor had any memorandum been endorsed on the certificate of registry, so that the bill of sale was a nullity. The defendant had never been consulted, nor had he at all interfered in the management or destination of the vessel, or derived any profit from it.

*180] *Under the direction of the learned chief justice the plaintiff was nonsuited, with liberty to move to enter a verdict for the amount of the price of the goods.

Vaughan, Serjt., now moved accordingly, and urged, that in order to give a party a title to sue, or a liability to be sued in respect of a ship, it was not necessary he should be strictly the legal owner. *Trover* will lie for one who is not registered owner, *Sutton v. Buck*, 2 Taunt. 302; and in *Hubbard v. Johnstone*, 3 Taunt. 205, *Wood, B.*, says, "I take it to be clear, so far as the statutes have hitherto gone, that if there were no registry, no certificate, no endorse-

ment, and no delivery of a copy, the sale would be good as between the vendor and vendee, though for want of these requisites the ship, if she traded, would be treated as a foreign ship, and liable to confiscation." The question, therefore, in a case like the present, is, to whom the credit was given, and it is always given to those who are actually and beneficially owners. In *M'lover v. Humble*, 16 East, 169, Lord ELLENBOROUGH says, that to incur responsibility the party must have been partner in fact, or must have been held out as such; and according to Abbott on Shipping, 125, 4 ed., liability to charges may be incurred by one who is not legal owner. The defendant, as a partner, has had the benefit of the goods which have been furnished; he is bound by the contract of the managing owner, and cannot be permitted to pervert the register acts to the purposes of injustice. *Trewhella v. Rowe*, 11 East, 435, is distinguishable, for in that case the party sought to be charged was not owner in fact or in law.

BEST, C. J. A man can only be charged in respect of property in a ship either upon credit given to him, or *as legal owner, or as having holden himself out as legal owner. In the present case, the defendant never [*181 held himself out as owner,—the plaintiff never knew he was owner, and the contract was made, not with any individuals by name, but with the owners generally; which distinguishes this from the case relied on, where credit was given to certain persons by name, though they had ceased to be owners. Now, was the present defendant an owner? No. The conveyance of 1816 was mere waste paper; it recited that the vessel was then registered at Exeter, which was so far from being the case, that ever since 1815 she had been registered in London. It is clear, however, that if a ship remove from one port to another as her home, and there is a change of owners, there must also be a new register, and they who desire to discover the true owners, must search the register at the ship's port. By 7 & 8 W. 3, c. 22, s. 21, it is enacted, "That no ship's name registered shall be afterwards changed without registering such ship de novo, which is hereby required to be done upon any transfer of property to another port, and delivering up the former certificate to be cancelled, under the same penalties and in the like method as is hereinbefore directed; and that in case there be any alteration of property in the same port by the sale of one or more shares in any ship after registering thereof, such sale shall always be acknowledged by endorsement on the certificate of the register before two witnesses, in order to prove that the entire property in such ship remains to some of the subjects of England, if any dispute arises concerning the same." And though many parts of that statute have been repealed, this enactment remains in force; for by 26 G. 3, c. 60, s. 43, it is enacted, "that all and every matter contained, &c., in any act or acts of parliament heretofore passed touching the trade, shipping, and navigation of Great Britain, &c., which is not hereby expressly *altered or repealed, shall remain and continue in full force [*182 and effect to all intents and purposes whatever, and so far as the same relate to the registry of ships and vessels, shall be deemed and taken to extend and apply in every respect to all ships and vessels authorized and required by this act to be registered and to have certificates of registry." Under the 34 G. 3, c. 68, it is true, that if there be no change of port, a ship may, upon a change of owners, be registered at her old station, but if she is removed, there must be a new register where the managing owner lives. In the present instance Welsford was the managing owner, and lived in London. If defendant had been an owner, he must have been so in 1812 under the Exeter register; but his name does not appear in that instrument, and the conveyance of 1816 was a nullity, because the 26 G. 2, c. 60, requires that the registry shall be set out in the conveyance, and if this be omitted no interest passes; according to the decisions, not even an equitable interest. But though the defendant was not the true owner, he might have been charged if he held himself out as owner; if he

appeared as owner, the defectiveness of the conveyance would not avail him. But the defendant was neither held out as owner, nor did the plaintiff consider him as such, at the time of the contract, and if he had consulted the registry at the custom-house, he would have seen that he was not owner. The cases cited do not bear on the question; and in *M'Iver v. Humble*, BAYLEY, J., put the point on the ground I now take. The defendant had no interest in the ship, he never held himself out as owner, nor was credit ever given to him, and therefore he ought not to be charged.

PARK, J. The point has been decided long ago by a variety of authorities, and the nonsuit ought not to be set aside. I concur in the principle which has *183] been *urged, that if a man holds himself out as an owner, he shall not divest himself of responsibility by setting up a defective conveyance. But the defendant never held himself out as owner, nor was the credit given to him.

BURROUGH, J. The only question here is, whether there was a contract in fact with the defendant, or whether he held himself out as owner. The plaintiff must go upon one or other of the two grounds; but he cannot here rely on either, for there was no contract in fact with the defendant, and he never appeared as owner. We do not decide that, if he holds himself out as owner, he shall escape liability by a defective conveyance; but as the facts have turned out, there is no pretence for charging the defendant, and the rule which has been prayed, must be

Refused.

LIDDARD v. KAIN.

The defendant, after telling the plaintiff that one of two horses he was about to sell had a cold, agreed to deliver both at the end of a fortnight sound and free from blemish: at the end of the fortnight the horses were delivered, one with a cough, and the other with a swelled leg, a fault that was also apparent at the time of the sale. In an action for the price, a verdict having been found for the defendant, the court refused to grant a new trial.

ASSUMPSIT to recover the value of horses sold and delivered. At the trial before BEST, C. J., Middlesex sittings after Easter term last, the defence was, that at the time of the purchase, the plaintiff agreed to deliver the horses at the end of a fortnight, sound and free from blemish, and that at the end of the fortnight one had a cough and the other a swelled leg; but it also appeared, that *184] the seller informed the buyer that *one of the horses had a cold on him, and that this as well as the swelled leg was apparent to every observer.

The jury having found a verdict for the defendant,

WILDE, Serjt., moved for a new trial, on the ground that where defects are patent, a warranty against them is inoperative.

Sed per Curiam. The warranty did not apply to the time of the sale, but to a subsequent period. There is no pretence for disturbing the verdict.

Rule refused.

BRINDLEY v. DENNETT.

Where there were counts in the same declaration for work and labour as an attorney, and for work and labour generally, the court refused to strike any out as unnecessary.

THE declaration contained two counts for work and labour by the plaintiff, as an attorney, two for work and labour generally, and the usual money counts.

WILDE, Serjt., moved to strike out, as unnecessary, the counts for work and labour as an attorney, referring to *Meeke v. Orlade*, 1 N. R. 289; *Gabell v. Shaw*, 2 Chit. 299, and other cases, as express authorities in favour of his motion.

But the Court (BEST, C. J., was absent) refused the application, considering it as more vexatious than the plaintiff's counts; and *Wilde*

Took nothing.

*PALMER and Others v. PRATT.

[*185

K., an East India captain, having borrowed money of R., in order to secure R., arranged with P. that K. should draw in favour of R. bills on C., (P.'s agent in Calcutta,) payable at thirty days after the arrival of the ship B., which bills R. was to endorse to P., and P. was to negotiate on Calcutta upon K.'s consigning to C. goods to double the amount of the bill:

Held,

First, That P. had no insurable interest in these bills.

Secondly, That even supposing he had, he could not recover upon a policy describing them as bills of exchange.

THIS was an action of assumpsit, brought on a policy of insurance subscribed by the defendant, for 500*l*.

The defendant pleaded the general issue, and paid 15*l*. into court, on the count for money had and received, that being the premium received by him. The cause was tried at the sittings in London, after Trinity term, 1822, before DALLAS, C. J., when a verdict was found for the plaintiff for 495*l*. (being the remainder of the sum claimed,) subject to the opinion of the court, on a case in substance as follows:

The policy of insurance on which this action was brought, bore date the 26th of August, 1818, and was effected for and on account of the plaintiffs.

The voyage or risk was, by the policy, expressed to be "at and from London, to all or any ports and places wheresoever and whatsoever on this side, at and beyond the Cape of Good Hope and elsewhere, during the ship's stay at each port and place, and on all services, until her safe arrival at Calcutta, upon any kind of goods and merchandises, &c., of and in the ship named the Paragon, whereof G. B. Keene was master."

The insurance was, by the policy, declared to be "on two bills of exchange," drawn by Keene on Cruttenden and Mackillop, of Calcutta, the one for 1500*l*., the other for 500*l*.

The perils insured against were those commonly enumerated in policies, and the policy was subscribed by the defendant, at a premium of 3 per cent.

The circumstances that led to the insurance were as follow: Keene, the captain of the Paragon, had *purchased goods on his own account, as an adventure for the voyage; and these goods having been in part purchased by means of advances made to him by Edmund Read, a ship and insurance-broker, it was found, on the settlement of accounts between them at Gravesend, before the vessel sailed, that the captain was indebted to Read about 2000*l*.

It was therefore agreed between them, that if Read could negotiate bills for about what was due he should do so.

In pursuance of this object Read applied to the plaintiffs, merchants in London, who thereupon agreed to negotiate bills on Calcutta to the amount of 2000*l*., one set for 1500*l*. and another for 500*l*. They required Read's endorsement upon the bills, and therefore the bills were to be made payable to him. The plaintiffs instructed him to have them drawn, payable thirty days after the arrival of the Paragon at Calcutta, at the exchange of 2*s*. 2½*d*. a rupee, which was then the current rate of exchange between London and Calcutta, and required that Keene should consign to Cruttenden and Mackillop, on whom the bills were to be drawn, goods to about double the amount of the sum for which they were to be drawn, to place them in funds, so that they might accept the bills. The plaintiffs instructed Read to effect policies on bills, and to leave uninsured, goods to the amount of the bills.

The captain being informed of the nature of the proposed transaction, agreed

to its terms, and drew the two bills stated in the policy, which were in duplicate, the one of them was for 4528 rupees 5 annas, and the other for 13,584 rupees 14 annas, and the tenor of them was as follows :

" London, 25th August, 1818.

" At thirty days after the arrival of the ship *Paragon* at Calcutta, pay this my
 *187] first of exchange, second and *third not paid, to the order of Mr. Edmund Read, 13,584 sicca rupees 14 annas value received, which place to account of

G. B. KEENE.

" To Messrs. Cruttenden and Mackillop, Calcutta.

" (Endorsed) *Edmund Read.*"

Read received from the plaintiffs the 2000*l.* upon the bills ; the captain shipped on board the vessel to the order of Cruttenden and Mackillop a quantity of goods, exceeding in value the two bills, and signed bills of lading thereof in triplicate to Cruttenden and Mackillop.

Read, on behalf of the plaintiffs, then proceeded to effect the policy in question at their expense and for their benefit. Before the defendant subscribed the policy, he was informed by Read that the insurance was on bills payable on the arrival of the *Paragon*, and Read also stated, that it was better than on goods, because not liable to average.

It was left to Read to raise the money in the best way he could. The bills of lading were not given as a security to the plaintiffs, but to Cruttenden and Mackillop, who were the agents of the plaintiffs in India.

The ship afterwards sailed with the goods and one set of the bills on board. There were purposely left uninsured on board of the ship goods of the captain to the full value of the bills.

In the course of the voyage the ship was totally lost, together with the set of bills and the said goods, by perils of the seas, such as were insured against by the policy ; and neither the ship nor the set of bills, nor the goods, nor any part thereof, ever arrived at Calcutta, nor were either of the bills ever paid or accepted.

A bill-broker, much conversant with the trade to the East Indies, being called
 *188] for the plaintiffs, stated, that *the practice here described had been frequent from 1810 or 1811 : he could not name any instance where bills were so drawn, and the ship had not arrived. The consignment is to induce the drawee to accept the bills. The object of drawing bills in this manner is to put the captains and officers of East India ships in cash to pay for their investments. Formerly this was done by *respondentia* ; *respondentia* still continues ; some prefer one mode, some the other. Bills are not so taken unless where the drawer takes out goods, or has funds in India. The witness knew of no instance of bills being so taken, unless where goods were carried out to India. The goods are consigned to the person on whom the bills are drawn. If the goods are lost and the ship arrives, the bills are paid ; if the goods arrive and the ship is lost, the bills are not paid. In that case, the holder of the bills has no remedy against the drawer.

The chief justice desired the jury to consider whether the advance of the 2000*l.* was made on the contingency of the *Paragon's* arrival at Calcutta ; and the jury found that it was made on such contingency.

The question for the opinion of the court was, whether, under these circumstances, the plaintiffs were entitled to recover upon the policy ? If they were, the verdict was to stand ; if not, a nonsuit was to be entered.

Taddy, Serjt., for the plaintiffs. The plaintiffs had an insurable interest, and are entitled to recover. The only grounds on which the contrary can be maintained are, either that there was no contingency in the subject-matter of the insurance, or, that it was improperly described as a bill of exchange. But the money advanced by the plaintiffs on the credit of the bills was clearly in

hazard, and if the ship failed to arrive they had no *other security than this insurance. The bills of lading belonged to Cruttenden and Mackillop, and were forwarded to them, to induce them to accept the bills of exchange; but the vessel having failed to arrive, they were not liable to accept those bills, and the plaintiffs were utterly deprived of whatever benefit they would have derived from the acceptance, so that they had the same interest in the bills, that a party who insures a life has in the continuance of the life. Then as to the objection, that these instruments were not bills of exchange, because only payable on a contingency, it must be admitted, that strictly and technically speaking, this was the case. But in common language they would have been called bills, and it was sufficient to describe them as such in a policy of insurance, for in a policy no greater degree of precision is necessary than is requisite to inform the underwriter what it is he undertakes to insure. Thus, an insurance of a lease will cover an underlease, or a lease with alterations and additions; and a factor may insure his lien by insuring the goods on which he claims it: *Godin v. London Assurance Company*, 1 Burr. 489. But the only difference between the present and ordinary bills, is, that an endorsee could not sue in his own name. The instruments are valid, though not negotiable, and may be considered as in the nature of a promissory note.

The defendant's counsel was stopped by the court.

BEST, C. J. I have no doubt on this case, although I am sorry the objections have been taken, because the defendant received a high premium, and the nature of the risk was fully explained to him. But there are *two objections to the plaintiffs recovering; one, that they had no insurable interest; the other, that if they had, they have failed to describe it properly. First then, what do they propose to insure? Bills of exchange:—and according to the language of the policy these might have been good legal bills; but on the record it appears, that they were only payable at thirty days after the arrival of the ship *Paragon*; so that if the ship did not arrive the bills would never be paid. What the plaintiffs therefore proposed to insure, was not a bill of exchange, but a right to recover money in case of the arrival of the ship: now, though a bill of exchange may be accepted on a contingency, it cannot be so drawn, lest the money-market should be loaded with instruments that would afford no security to the holder. It has been argued, however, that these instruments were valid though not negotiable, and that they were binding on the drawer in the same way as a promissory note. But before the statute of Ann, a promissory note payable on a contingency would have been void, as appears by the case of *Pearson v. Garret*, Comb. 227, and this is equally the case at present, even between the original parties; *Ferris v. Bond*, Bayley on Bills, 4th ed. 13, n. The instruments in question, therefore, were waste paper; the plaintiffs have lost nothing by them, because they could have recovered nothing on them; and so far from having lost money, or even put it in risk, the consideration for their loan being void, they might sue the borrower in an action for money had and received. There was, therefore, no insurable interest, because there was no risk. But even if there had been an insurable interest, it was incumbent on the plaintiffs correctly to describe what it was they insured: that they have not done. This is not an insurance on bills, but against a want of validity in bills. But it has *been argued, that in common parlance [190] these are bills, and that the language of common parlance is sufficient [191] for a policy of insurance. I think not; for the underwriter might say he thought he was insuring good bills, whereas these had no character of a bill. The cases which have been cited, are decisions on things well known and commonly talked of; whereas the practice which has occasioned the present question is of so recent a date, that there can be no common parlance about it. But the cases are rather against the plaintiffs. In *Gregory v. Christie*, Park Ins. 4th ed. 11, even under the very general term *effects*, money spent in the

course of the voyage, for the use of the ship, was holden not to be insurable except under an established usage. I see no connection between the present case and cases of insurance for life; and as for the insurance on a lease, the question can never arise in the way it has been pressed in argument.

I regret that we are compelled to come to this decision, because insurance transactions ought to be conducted *uberrimâ fide*; but the present is a new practice, and the parties who engage in it must take the consequence. There are many other ways of insuring the same interest without having recourse to this expedient: the money might have been lent on *respondentia* or the goods might have been consigned to a third person in India, and the bills of lading endorsed to him. As the transaction stands at present, the plaintiffs must submit to be nonsuited.

PARK, J. I think the plaintiffs had no insurable interest, because there was no event in which they could have sustained loss. The jury, it is true, have found that the advance was made on a contingency; but it is clear, that if the bills were not paid in India, the plaintiffs were entitled to recover back^{*192} their money in England: besides, if the money had been lent on a contingency, the plaintiffs would have stipulated for, and have received the high interest which is usually paid in such cases. I admit, that a party who has only a special interest in goods, may recover in respect of that interest on a general insurance; but still the subject-matter of the insurance must appear with sufficient certainty on the policy, and it is the duty of the court to restrain these novelties; for though a policy is but a vague and indefinite instrument, and the language employed in it need not be technical, yet it ought to appear, at least, that the insurance effected is valid. In the present case, even supposing the plaintiffs to have had an insurable interest, it is not well described. The instruments insured are not bills of exchange, but mere waste paper.

BURROUGH, J. These instruments were not bills of exchange, and therefore the plaintiffs could not recover in respect of them under this policy. I am not for introducing new modes of expression into the policy of insurance, which is a useful contract, and ought therefore to be conducted under the ancient and received forms. The instances which have been adduced in argument, of an agreement for a lease, or a lease with alterations being insurable under the denomination of a lease, do not apply to the present case; and considering that the plaintiffs had neither an insurable interest, nor have properly described the interest they proposed to insure, the defendant is entitled to have a judgment of nonsuit entered up.

Judgment of nonsuit accordingly.

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***STANIFORD v. SINCLAIR and Others.**

AVOWRY, "that for all the time during which the rent was accruing due, and from thence until and at the time when, &c., and until and at the death of T. F., the plaintiff held the place in which, &c., as tenant to T. F. in the lifetime of T. F. under a demise, and because two years' rent due from the plaintiff to T. F. in his lifetime remained unpaid, and because the plaintiff remained in possession of the place in which from the death of T. F. till the time when, &c., the avowants, as executors of T. F., distrained:" Held sufficient on demurrer.

REFLEVIN. Defendants, as executors of Thomas Fraser, deceased, avowed the taking, in August, 1823, in the place mentioned; because the plaintiff, for all the time during which the rent thereafter mentioned was accruing due, and from thence until and at the time when, &c., and until and at the time of the death of Thomas Fraser, held the place in which, &c., as tenant to Fraser, in the lifetime of Fraser, under a demise made to him, at a yearly rent payable quarterly; and because 247*l.*, the value of the rent for two years, due from the plaintiff to Fraser, in his lifetime, (which Fraser died March 12, 1823,) remained unpaid to Fraser or his executors; and because the plaintiff remained

in possession of the place in which, from the death of Fraser till the time when, &c.

In a second avowry the defendants avowed the taking, because the plaintiff held the place in which, &c., as tenant to the defendants, by virtue of a demise made to him under a yearly rent, payable quarterly; and because 146*l.* rent, for three quarters, was due to defendants; and because the defendant stayed in possession of the place in which, &c., until the time when, &c.

On the second avowry the plaintiff entered a nolle prosequi. To the first he demurred.

Taddy, Serjt., in support of the demurrer. At common law a distress could only be made during the continuance of the demise; here, on the face of the avowry, it appears that the distress was made subsequently, for it is averred that the plaintiff held the land as tenant, *until the death of Fraser. It is alleged, indeed, that the plaintiff continued in possession; but the [*194 possession of the occupier will not of itself authorize a distress; there must be some privity between him and the party distraining. The statute 8 Ann, c. 14, gives a right to distrain, where the title of the landlord continues, as well as the possession of the tenant, even though the demise shall have determined; but on these pleadings it does not appear that the avowants had any title, and the statute would have been unnecessary if mere possession would authorize a distress.

The 11 G. 2, c. 19, s. 22, does not extend to distress by executors for freehold rent, under 32 H. 8, c. 37. And the avowry is not sufficient under 32 H. 8, because it does not appear that the testator was seized of any estate of freehold in the rent distrained for.

Peake, Serjt., contra. The avowry is sufficient within the terms of 11 G. 2, c. 19, s. 22, which are comprehensive enough to include a case, such as the present, and to enable executors, where the tenant continues in possession, to distrain for the arrears of a freehold rent, due in the life of their testator; the present avowants have brought themselves within the language of the statute, and have also shown that the plaintiff was in possession, and at least a tenant from year to year, which is an answer to the objection that the demise to the plaintiff was ended. But it appears from Co. Lit. 162 a, b, and *Hool v. Bull*, 1 Ld. Raym. 172, that the statute 32 H. 8, also has always received an extended and beneficial construction, and *Powel v. Killick*, 1 Selw. N. P. 2d ed. 709, n., is in point for the avowants. *Renvin v. Walkin*, 1 Selw. N. P. 2d ed. 709, which seems contra, was decided before the stat. G. 2. Unless the *contrary is alleged it must be intended that the testator was entitled to the rent in fee, which, as well as a rent for life, must be taken to be [*195 within the protection of the statute.

Taddy, Serjt., in reply. It does not appear on the avowry that the testator was seized of a rent in fee: it is true, that fact was presumed in *Martin v. Burton*, 1 B. & B. 279, but the presumption arose after verdict: besides rents in fee are not mentioned in 32 H. 8.

BEST, C. J. If the plaintiff were entitled to our judgment in this case, the executors of a lessor, who died seized of a freehold rent, would have no remedy for arrears accruing in the testator's lifetime, until a new act of parliament should have been passed. But I am of opinion that the answer which has been given on the part of the avowants to this demurrer is satisfactory, and that the avowants have done all which the statute of G. 2, requires. I put the statute of 8 Ann out of the question, for since the statute of G. 2 all the avowant need do, is, to state on the record as much as is necessary to show a *prima facie* right, and if there be any answer it is for the plaintiff to plead it in bar. It is enacted in the twenty-second section of that statute, that it shall be lawful for all defendants in replevin "to avow or make conusance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was

made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due." All that the statute requires has been done; the avowants have

*196] "shown that the tenant was in possession, and the rent due: the statute then says, "without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, &c., any law or custom to the contrary notwithstanding." In the teeth of these words it is contended, on the part of the plaintiff, that the avowant ought to show his title: but I am clearly of opinion that this case is within the words of the act, and that it is not necessary to set out more of the avowant's title than has been set out here. But it has been contended for the avowants that they are entitled to our judgment, independently of the 11 G. 2. That the testator was owner of the rent, and that unless the contrary is alleged, it must be taken he was owner in fee, to which it has been answered, that such an ownership is not within the relief afforded by 32 H. 8, c. 37, by which it is enacted that it shall be lawful for the executors and administrators of every tenant in fee-simple, fee-tail, or for life, of any rent-service, rent-charge, rent-seck, or fee-farm, "unto whom any such rent or fee-farm is or shall be due, and not paid at the time of his death, to distrain for the arrearages of all such rents and fee-farms upon the lands, tenements, and other hereditaments, which were charged with the payment of such rents or fee-farms, and chargeable to the distress of the said testator, so long as the said lands, &c., continue, remain, and be, in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee-farm, so being behind to the said testator in his life, or in the seisin or possession of any other person or persons claiming the said lands, &c., only by and from the same tenant, by purchase, gift, or descent." It is therefore admitted, that if this is a case within the statute, the title of the landlord need not be set out. But I am not disposed to

*197] narrow the construction of the statute: payment of rent is rent-service; the money is received in lieu of the service, and *Powel v. Killick* has expressly decided the point in dispute. It is true there is also a case which seems to lean the other way; but where there are conflicting decisions I shall always look to consequences, and the consequences would be most mischievous if the decision in *Powel v. Killick* be held erroneous. But in *Rennin v. Watkin* nothing more is expressed than an inclination of opinion; the balance of authority, therefore, is in favour of the avowants: besides, where a statute is remedial, the court is bound to put upon it the largest and most beneficial construction they can, and to bring within the scope of the act all the cases which are within the mischief to be provided against; if it were otherwise, a party entitled to rent might be deprived of his most effectual remedy.

PARK, J. *Rennin v. Watkin* was decided previously to the statute of G. 2, but *Powel v. Killick* was brought to the notice of this court, and confirmed in *Martin v. Burton*. *Martin v. Burton* and *Meriton v. Gilbee*, 8 Taunt, 159, are expressly in point for the avowants, and *Lingham v. Warren*, 4 B. Moore, 409, contains the following remarkable words of RICHARDSON, J.: "The avowry is good on the face of it, as it is therein alleged that rent was due from the plaintiff to the testator as well as to the defendants as his executors. That, therefore, was sufficient to give them a chattel interest, and their testator must be presumed to have an estate in fee until the contrary appears, and it was not incumbent on them to set forth his interest, in the avowry. The answer to it by the plaintiff in his plea in bar is merely that the testator levied a sufficient

*198] "distress for the same rent; that alone is insufficient, for he ought to have answered the avowry in toto, and shown that the rent was fully satisfied by such distress." There is no plea in bar here, and the avowants are entitled to our judgment.

BURROUGH, J. *Powel v. Killick* was decided by LEX, C. J., who was an

able lawyer, and *Martin v. Burton* having confirmed it, our judgment must be for the

Avowants.

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*IN THE EXCHEQUER CHAMBER.

[*199

AITCHESON v. CARGEY.(a)

(In Error.)

The declaration stated that the plaintiff and defendant, by articles of agreement, (reciting that several actions arising out of the same transaction had been brought, and defended by the plaintiff and defendant, G. A. and D. A., and that in one of them the assignees of one G. F., a bankrupt, recovered against the plaintiff 2500*l.*, and that disputes existed between the plaintiff and defendant respecting the value of the goods and stock which each had received from a certain farm, and their keep and feeding by the plaintiff, and also concerning the proportion which each was to pay of the said sum of 2500*l.* according to an agreement entered into between them before the trial, and also concerning the costs of bringing and defending the actions above mentioned,) submitted themselves to the award of J. T., J. R., and T. C. respecting the said matters: that the arbitrators, taking the said matters into consideration, awarded the defendant should pay the plaintiff 444*l.*; that five eighth parts of the costs of the several actions before mentioned should be paid by the plaintiff, and three eighths by the defendant; that the sums already expended by either of them should be allowed as part payment of his proportion; and that when the sum of 444*l.* and the costs, including those of the arbitration and award, were paid, mutual releases should be given. On demurrer, held that the plaintiff was entitled to recover the 444*l.*: for that as to the first part of the award, nothing appeared on the declaration to show that the arbitrators had not awarded the sum of 444*l.* after taking into consideration the value of the stock and goods; that it was sufficiently certain; and that if the arbitrators had exceeded their authority as to costs, it was not sufficient to invalidate the award.

DEBT on an award. The declaration stated that certain differences having arisen, and being, between the plaintiff and defendant below, on, &c., at, &c., by articles of agreement made between the plaintiff below of the one part, and the defendant below of the other part, (reciting that an action was then lately depending in the Court of King's Bench between Cargey as plaintiff, and one Thomas Purvis, defendant, which cause came on to be tried at the then last assizes for Northumberland, upon which a verdict was given for the defendant; and *reciting also, that another action was depending in the said court, [200 wherein the assignees of John Tarleton, a bankrupt, were plaintiffs, and the plaintiff below was defendant, and which last mentioned action came on to be tried at the same assizes; and reciting also, that there were several actions depending between the said assignees and the defendant below, George Aitcheson and David Aitcheson, relating to the same transaction; and reciting also, that it was agreed that a judgment in the action by the assignees against the plaintiff below should be recorded for the plaintiffs with 4,000*l.* damages; and that a rule of court was drawn up, that upon payment of 2500*l.* to the plaintiffs, and immediate possession of a certain farm at Great Ryle, in the county of Northumberland, delivered by the said G. A. and D. A., the tenants thereof, to their landlords, the said judgment should be satisfied; that all the actions pending for the same transactions should be no further proceeded in, and that each party should pay his own costs: and reciting also, that divers disputes and differences had arisen between the plaintiff below and the defendant below about the value of the stock and goods which each of them received into his custody from the said farm, and their keep and feeding by the plaintiff below, and also concerning the sums which, according to an agreement entered into between them before the said assizes, they respectively should contribute towards the payment of the 2500*l.*, and the costs incurred in bringing and defending the said actions brought and defended by the plaintiff below and defendants G. A. and D. A.; and that, in order that the said differences might be amicably settled, the plain-

tiff and defendant below had agreed to refer the same to J. T., J. R., and T. C., as thereafter mentioned,) it was witnessed, that for ending all disputes and differences between the parties thereto, the plaintiff below did thereby covenant *201] with the defendant below, and the defendant *below did thereby covenant with the plaintiff below, that they, the plaintiff and defendant below, would truly perform the award of the said J. T., J. R., and T. C., of and concerning the said matters in difference: the declaration then averred the making of an award by the arbitrators, which award, after reciting the articles of agreement, was as follows: "We, the said J. R., J. T., and T. C., having taken upon ourselves the burden of the arbitrations, and having heard and weighed the allegations of both the parties concerning the matters so in difference as aforesaid, and examined the various vouchers, documents, and evidence relating thereto, do by these presents, in writing under our respective hands, award that all disputes and differences now or heretofore subsisting between them, or between the said Gilbert Cargey and James Aitcheson, relative to the matters referred to us by the articles of agreement, shall henceforth cease and determine. And we further award that the said James Aitcheson do and shall pay unto the said Gilbert Cargey, on, &c., the sum of 444l. And we do hereby further award, that the said Gilbert Cargey shall pay, or cause to be paid, five eighth parts, and the said James Aitcheson shall pay three eighth parts of all costs incurred either in prosecuting the action brought by the said G. Cargey against T. Purvis, or of defending the several actions wherein the assignees of J. Tarleton, a bankrupt, were plaintiffs, and the said G. Cargey, James Aitcheson, G. A., and D. A. were defendants, or any or either of them. And we further award, that all such sums of money as the G. Cargey and T. Aitcheson have already paid, laid out, and expended for and towards, or on account of the said suits, or either or any of them, or any way connected therewith, shall be considered and deemed as part payment of their respective shares according to the proportions above mentioned. And we further award, that all expenses attending this arbitration, and of these *presents, shall be paid and satisfied by the said Gilbert Cargey and James Aitcheson, in equal shares and proportions: and, lastly, we further award that the said Gilbert Cargey and James Aitcheson shall, upon payment of the sum of 444l., and the costs, charges, and expenses of the said several suits, and the charges and expenses of this arbitration, execute unto each other mutual and general releases and discharges of all actions, &c., relating to the premises so referred, or any of them, from the beginning of the world to the day of the date of the said hereinbefore in part recited articles of agreement." Breach, non-payment of the sum of 444l. Demurrer and joinder.

Campbell for the plaintiff in error. The award is bad, because it is uncertain, and exceeds the submission. There is a distinction in the cases between a general reference and a reference of specific points. On a general reference, a party who is dissatisfied, on the ground that any of the matters referred have been omitted in the award, must himself make out that there has been such an omission; but on a reference of specific points, such as the present, the award is bad if it does not contain on the face of it a determination on each of the specific points; for the consideration of submitting to such a reference is, that all the points shall be settled: *Randall v. Randall*, 7 East, 81. If the general words, "*The arbitrators have heard and weighed the allegations of the parties touching the matters in difference*," would cure such an omission, no award would ever be bad. In the present award the arbitrators have omitted to specify, first, the value of the stock and goods which each of the parties had received into their custody from the farm; secondly, of their keep and feeding *203] by the plaintiff; *thirdly, the sums which the parties were respectively to contribute towards the 2500l. Then with respect to costs, the submission is only as to "the costs incurred in bringing and defending the said

actions brought and defended by the plaintiff and defendant below, G. A. and D. A.," whereas the award is not only as to "all costs incurred either in prosecuting the action brought by the said G. Cargey against T. Purvis, or of defending the several actions wherein the assignees of J. Tarleton a bankrupt were plaintiffs, and the said G. Cargey, J. Aitcheson, G. A., and D. A. were defendants," but also as to "all expenses attending the arbitration and award." This clearly exceeds the submission: it cannot be separated from the rest of the award, and renders the whole vitious.

Wightman, for the defendant in error, was stopped by the court.

Best, C. J. This is a writ of error from the Court of King's Bench in an action on an award. The award has been set out in the declaration, to which there is a general demurrer, and there is no plea that points are contained in the submission which the arbitrators have not decided. We can only look, therefore, to what appears on the face of the award, and in order to give validity to the objections that have been raised, it must, according to what was laid down by Lord ELLENBOROUGH in *Randall v. Randall*, appear upon the award that points which have been submitted to the arbitrators remain undecided. But nothing of this sort appears in the declaration. It has been objected that the value of the stock and goods which each of the parties received into their custody from the farm has not been ascertained; nor the expense of their keep and feeding; nor the sums which the parties should respectively contribute towards the payment of the 2500*l*. But no case has been decided in [*204 which arbitrators have been required to show the steps by which they arrive at their conclusions. It is enough if it appears they have taken into consideration all the matters submitted to their judgment: they say they have done so here; they award that the defendant shall contribute 444*l*., and that the parties shall execute general releases, and this does finally settle all the points in dispute. The objection raised in the court below, that only the proportion of costs which each should pay was specified, instead of the sum actually payable, has not been repeated to-day; but it has been urged, that the arbitrators have exceeded their authority in disposing of costs over which they had no control. If that be so, it is an excess which does not vitiate the whole award: it is simply a decision on a matter not regularly before the arbitrators, and to that extent may be considered a nullity; but the rest of the award remains unimpeached, and the judgment below must be Affirmed.

PEMBERTON v. BROWNING.

Warrant of attorney. Entering up judgment against a defendant out of the country.

UPON an affidavit, that the last time up to which the plaintiff had been able to obtain any intelligence of the defendant, was October, 1823, at which period he was in Newfoundland, but about to leave that island for the United States; also, that his son and mother, who lived in this country, had declined to give any information, and that there was no other person to whom the plaintiff could apply,

*The Court permitted *Onslow*, Serjt., to make absolute a rule nisi he had obtained for entering up judgment against the defendant under a [*205 warrant of attorney.

HAHN v. CORBETT.

Insurance on goods in a ship warranted free from capture and seizure.

The ship was stranded on a shoal within a few miles of the port of destination, disabled from proceeding, and lost; but while she lay in the sand she was seized by the commander of the place at which she was stranded, and the goods were confiscated by him: *Held*, a loss of the goods by the perils of the seas.

This was an action of assumpsit, brought against the defendant, an under-

writer at Lloyd's, to recover 200*l.*, the amount of his subscription on a policy of insurance on goods, by the *Mary*, on a voyage from London to Maracaybo.

The declaration contained three counts on the policy, which all averred the interest to be in the plaintiff. The first count averred a total loss by the perils of the seas; the second averred the loss as follows:

"That while the ship was in the course of her voyage, and while the goods remained on board, within a certain district or territory, then under the dominion of the Spanish government, the said ship became and was, by the perils and dangers of the seas, and by force and violence of the winds and waves, driven on the sands, broken, damaged, rendered wholly unnavigable and disabled from proceeding; whereupon, afterwards, viz., on, &c., at, &c., the said ship so being in that condition, with the said goods and merchandises so on board thereof, the said ship, goods, and merchandises were forcibly arrested and taken possession of by certain persons acting by authority of the Spanish government, at a certain place, in parts beyond the seas, then under the dominion of that government, viz., at Maracaybo aforesaid, as forfeited for prize, on *206] the alleged ground, that the said goods and merchandises, *and other goods on board the said ship, had been shipped on the said voyage, for the supply of certain persons then carrying on public hostilities with the said Spanish government, but alleged by that government to be rebels against its lawful authority; whereby the said goods and merchandises so insured by the said policy, became and were wholly lost to the said plaintiff; and that the said loss of the said ship and goods was not a loss by capture or seizure, or the consequences of any attempt thereat, within the meaning of the said policy."

The third count averred the loss as the second, except that it stated "that the ship, &c., were forcibly, and in a piratical manner, taken possession of, by certain foreign persons, to the plaintiff unknown, residing in parts beyond the seas, viz., at Fort San Carlos, in South America, and converted by those persons to their own use; whereby, &c., as above set out.

The defendant pleaded the general issue, and the cause was tried at the adjourned sittings after Trinity term, 1823, before BURROUGHS, J., when a verdict was found for the plaintiff for 200*l.*, subject to a case.

The policy of insurance was, by consent, annexed to the case; it bore date the 18th of July, 1822, and was effected by the plaintiff in London, on Manchester cotton goods, per the *Mary*, on a voyage from London to Maracaybo, with liberty to touch in the West Indies, for all purposes whatever; and the plaintiff had an insurable interest in the goods to the full amount of the sum insured. By a memorandum on the policy it was declared, that the insurance was on goods, as might be declared thereafter, to pay average separately on each package, warranted free from capture and seizure, and the consequences of any attempts thereat. And by another memorandum, afterwards made, the *207] interest *insured by the policy was declared to be on certain cases, packages, and boxes of goods, valued at 4124*l.* 5*s.* exclusive of premiums and insurances, freight and commission. The case was as follows:

The *Mary* sailed from Gravesend, with the goods insured on board, on the 4th of July, 1822, bound on her voyage, and arrived, on the 17th of September, at midnight, off the gulf of Maracaybo; at noon the next day, the vessel being then eight or nine miles from Fort San Carlos, (a military post more than twenty miles from Maracaybo,) for want of a pilot ran for the bar of Maracaybo, but on account of the shoal or shallow water was obliged to come to an anchor, and drifted on the sand, and was lost by the perils of the sea.

On the morning of the next day, the 19th of September, the ship being still in the sands, with her cargo on board, the captain applied at Fort San Carlos for assistance to enable him to save the cargo, but was then, for the first time, apprised that Maracaybo and Fort San Carlos had (as the fact was) been recently taken by the Spanish forces, acting by authority of the King of Spain,

from certain persons or people associated together as a government or power by the name of the republic of Colombia, and that the ship and cargo would be considered as prize, on the alleged ground, that the cargo had been shipped for supply of the republic. The captain and crew were, on the same ground, kept in confinement at Fort San Carlos, and afterwards sent up as prisoners of war to Maracaybo, and were thereby wholly prevented from making any exertion to save the cargo. On the same morning, (19th September,) by command of the persons in authority at Fort San Carlos, certain subjects of the King of Spain repaired to the ship, then still fixed in the sand, with her cargo on board, and began to unload the same; the whole of which was accordingly taken out, part in a sound and part in a *damaged state. Two lighter loads of Manchester cotton goods were taken to the fort, sound and undamaged. [*208

Among other articles some Manchester cotton goods were taken to Maracaybo; the principal part was very much damaged, and they arrived loose; they were brought up in the boats and washed with fresh water, and were possessed by the persons acting under the authority of the King of Spain: not one-twentieth part of these goods being sound. These persons having taken possession of the goods for prize, no part of the cargo, or the proceeds thereof, ever came into the possession of the insured, or of any of their consignees or agents.

Intelligence of the loss first arrived in England on the 4th of December, 1822, when the plaintiffs immediately gave a full and regular notice of abandonment of the goods to the underwriters, as having been lost by the wreck of the vessel, which notice the underwriters refused to accept.

The question for the opinion of the court was, whether, under these circumstances, the plaintiff was entitled to recover from the defendant the amount of his subscription?

If he was, the verdict was to stand, if not, a nonsuit to be entered.

Bosanquet, Serjt., for the plaintiff. The goods insured were lost by the perils of the seas, and never came to the hands of the consignees of the assured. The ship, with the goods on board, having been lost, it is immaterial whether the loss took place in the middle of the sea or near shore. It is true, that by what occurred the underwriters have lost the benefit of salvage; but that does not divest the plaintiff of his claim against them. The defendant's objection rests on the supposition that the ship would have been seized if she had not been lost; but it by no *means follows that such would have been the case, for the master, when he learned in whose hands the country was, [*209 might have borne away but for the disaster on the sand. The case is materially distinguishable from that of *Livie v. Janson*, 12 East, 648, where there was a dispute about average, and the ship was only delayed instead of being absolutely lost, as here.

Vaughan, Serjt., contra. In considering whether the insurers are liable, the proximate, and not the remote, cause of the loss must be looked at. *Green v. Elmslie*, Peake's N. P. C. 278; *Hudson v. Harrison*, 3 B. & B. 97; *Hudson v. Marjoribanks*, 1 Bing. 393. In the present case the perils of the sea might have been the remote cause; but the immediate cause of the loss was the seizure by the enemy. In *Green v. Elmslie* the ship was stranded, as in the present case. In *Hunt v. The Royal Exchange Assurance Company*, 5 M. & S. 57, BAYLEY, J., says, "This is a policy on goods, which are not so necessarily connected with the ship, that if the ship be lost, there must of course be a loss of voyage with respect of the goods; because, if the goods are in safety they may be transhipped, and conveyed to their destination." Here the goods were safe till seized by the enemy; they then reached their destined land, so that with regard to them there has been no loss of voyage. *Thompson v. Royal Exchange Assurance Company*, 16 East, 214. No period of time can be pointed out at which the goods can be said to have been lost.

Bosanquet, in reply, was stopped by the court.

BEST, C. J. The facts of this case are short: the goods were insured in a ship from London to *Maracaybo, with liberty for her to touch in the *210] West Indies. The plaintiff had an insurable interest, and, by a memorandum on the policy, it was declared that the insurance on the goods was warranted free from capture and seizure; and the question is, whether the loss averred in the declaration was a loss by capture or seizure, or by the perils of the seas. If it was a loss by capture or seizure the defendant is not liable; if a loss by the perils of the seas, it is within the terms of the policy. It appears on the case, that while the ship was on her voyage to Maracaybo, at the distance of eight or nine miles from Fort San Carlos, she was obliged to come to an anchor, for want of a pilot, drifted on the sand, and was lost by the perils of the sea. It has been argued on the part of the defendant, and cases have been adduced, and the language of **BAYLEY, J.**, particularly relied on in support of the position, that though the ship is lost, it does not necessarily follow that goods on board her should be lost within the meaning of a policy of insurance. But what are the facts here? the ship is totally lost; and though the goods are afterwards recovered in a damaged state, they fall into the hands of an enemy, and, but for that circumstance, would also have been totally lost. It has been asked *when* the goods can be said to have been lost?—when the ship was totally lost. There is no statement that any other ship was at hand, or that any land was near. If the underwriters were exempted from liability, on capture by an enemy, they were not entitled to calculate on preservation of the goods by an enemy; but if the enemy had not come, it is clear the goods would never have been moved, because the ship never moved. It was just as if they had been cast on a rock, and had been completely out of reach. The goods, therefore, were lost when the ship was lost, and what happened afterwards makes no difference in the case. According to the argument for the *211] defendant, if the goods had been drifted ashore after the wreck, they were not lost; but the moment the ship became immovable the goods were lost and the policy attached: it is immaterial whether they were afterwards picked up by an enemy or by fishermen; and this distinguishes the present from the cases to which we have been referred. It has been urged, that the proximate cause of the loss, and not the remote cause, must be looked to; but this brings us back to the question, what was the proximate cause? I say the perils of the seas. The case of *Livie v. Janson* is materially distinguishable from the present. In that case, though, perhaps, the facts would have warranted the statement of a total loss, the loss is stated not to have been total; but Lord **ELLENBOROUGH** says, "The ship and goods were damaged by the perils of the seas, and were afterwards seized by the American government and condemned." (Here the goods were seized, but the ship was left a wreck;) "and the question is, whether the total loss by subsequent seizure and condemnation, takes away from the assured the right to recover, in respect to the previous partial loss by sea-damage?" Here the goods must have been destroyed but for the enemy, and the enemy took them, not to save, but to appropriate. In *Green v. Elmalie* it was holden, that if a ship be driven by stress of weather on an enemy's coast, and there captured, it is a loss by capture, and not by the perils of the seas. In the present case the ship was not driven on the coast, but lost nine miles off; it was destroyed by the waves, instead of being, as in that case, undamaged by the wind; and instead of being lost by capture, the enemy, though they removed the cargo, could never fit her out or remove her from the sand. These cases, therefore, being put out of the question, our judgment must be for the plaintiff.

*212] ***PARK, J.** I thought at first that the plaintiff could not recover, but I am now convinced of the contrary, and the confusion has been occasioned by the way in which the case is stated. But in fact, the vessel and cargo were wrecked, and a total loss incurred before the enemy interfered.

Not a twentieth part of the cargo remained undamaged, and there were no means of carrying it on. Supposing the goods had been sunk, the assured would have been entitled to recover for a total loss; and if they had afterwards been fished up by the enemy, would that have made any difference? Assuredly not. In *Bondrett v. Hentigg*, 1 Holt, N. P. C. 149, an action on a policy of insurance on goods, the vessel was wrecked, and part of the goods were lost and part got on shore, but whilst on shore they were destroyed and plundered by the inhabitants of the coast, so that no portion of them came again into the possession of the assured: it was holden, that this was a loss by the perils of the sea, and that no abandonment was necessary. If we change "enemy" for "inhabitants," that case is not unlike the present, in which our judgment must be for the plaintiff,

BURROUGH, J. I tried the cause, and decided on the principle laid down in *Livie v. Janson*, that in all cases the loss must be referred to the causa proxima; and the causa proxima of the loss of the goods in the present instance, was the loss of the ship. There is, however, a material distinction in the facts of *Livie v. Janson*, which it is requisite to attend to, because qui bene distinguunt bene docent. In the present case, the injury was occasioned by the waves and the shoal; in *Livie v. Janson*, the ship was not hurt by the wind, and the loss was virtually occasioned by her breaking the embargo. Upon the principle, therefore, that the proximate cause of loss must be looked to; [*213 and considering that, in the present case, the perils of the sea were that proximate cause: our judgment must be

For the plaintiff.

The same judgment was given in another case, which only differed from the present, in the circumstance that the goods were undamaged.

BRISCOE v. STEPHENS.

Plea to a declaration in assumpsit,—that the plaintiff had sued in an inferior court, in which judgment had been given against him, for the same cause of action; (not stating that the consideration arose within the jurisdiction of the inferior court.)

Replication, that plaintiff and defendant both resided out of the jurisdiction, and that the cause of action arose out of the jurisdiction: Held sufficient on demurrer.

DECLARATION in assumpsit for goods sold, with a quantum meruit, and the usual money counts. The defendant pleaded, first, the general issue; and, secondly, a verdict and judgment previously given in his favour, and still in force, in an inferior court of record at Ludlow in Salop, on the same cause of action. The whole of the proceedings in the suit in the inferior court were set out in the plea. And from them it appeared, that the plaintiff had in that suit declared, for that whereas the defendant being indebted within the jurisdiction of the court at Ludlow for goods sold, promised within its jurisdiction to pay the plaintiff; without stating that the goods were sold, or that the cause of action arose within the jurisdiction of that court. There were several other counts in this declaration, all of them with a similar omission.

The plaintiff replied, that at the time he levied his plaint in the court at Ludlow, and from thence till the time judgment was obtained in that plaint, [*214 both himself and the defendant were residing without the jurisdiction of that court; that the causes of action arose out of its jurisdiction; and that the court had not, at the time of levying the plaint, or at any time afterwards, jurisdiction over the causes of action. Demurrer and joinder in demurrer.

For causes of demurrer, it was shown that it appeared from the record and proceedings, that the issue in the inferior court was not upon the fact, whether at the time of levying the plaint, and from thence until the time of giving judgment, the plaintiff and defendant were, or either of them was, living within the jurisdiction of the court, but was whether the defendant promised in manner

and form as the plaintiff had complained against him; that it did not appear, nor could it be collected from the record or proceedings that judgment was given upon, for, or by reason of the parties, or either of them, not residing within the jurisdiction of the court; but on the contrary, that it appeared on the record, that the judgment was given upon the finding of the jury who tried the issue, as to whether the defendant had promised as the plaintiff had complained against him, and who found that the defendant had not so promised; and that the plaintiff had not denied that the promises and causes of action in the declaration in this court mentioned, and those mentioned in the declaration in the court at Ludlow, were the same. And also, that the plaintiff by his replication had averred against a record to which he was a party: viz., that the judgment in the inferior court was given upon other grounds than those which appear upon the record. And also, that it appeared by the record, that the plaintiff himself levied the plaint, and thereby assumed that he and the defendant were within the jurisdiction of the court, and that it did not appear by the record that the *215] defendant denied *the jurisdiction of the court. And, lastly, that the replication did not state that the judgment in the court at Ludlow had been reversed; but, on the contrary, it was stated in the plea and not denied in the replication, that it was still in full force, &c., and not in any respect reversed, &c.

Peake, Serjt., in support of the demurrer, urged against the replication the objections above stated, and especially that the plaintiff having resorted to the inferior court, was estopped to deny its jurisdiction.

Wilde, Serjt., for the plaintiff. By the demurrer it is admitted, that the court below had no jurisdiction; it therefore would not have availed the plaintiff, even if he had recovered there, because, had he endeavoured in such a case to enforce the judgment of that court, he would have been a trespasser; 1 Wms. Saund. 74 b, n. 1, edit. ult.; *Rex v. Danser*, 6 T. R. 242. A plaintiff who fails to obtain his debt by means of the inferior court, is deprived of all remedy unless he can resort to the superior.

But on the plea itself, judgment must go against the defendant. In pleading the proceedings of an inferior jurisdiction, every thing is taken to be out of the jurisdiction, which is not expressly alleged to be within it; in order to give such courts authority, the consideration for the promise must be alleged to have arisen within the jurisdiction as well as the promise itself: *Peacock v. Bell*, 1 Wms. Saund. 74; *Trevor v. Wall*, 1 T. R. 151. In the present case, it is *216] merely stated that the defendant was indebted within *the jurisdiction, and it does not appear on the record that the judgment of the court below was on the merits; and according to *Outram v. Morewood*, 3 East, 346 a party is not estopped to contend any fact, unless it has been found against him in a neat and pertinent form: but the judgment of a court not competent, cannot in any case be pleaded in bar to an action in a competent court: *Mico v. Morris*, 3 Levinz, 234.

Peake, in reply. While the judgment in the court below continues unreversed, it is binding on all parties. It must be intended, that the decision there was a decision on the merits, for matters of jurisdiction must be especially pleaded; and if the replication be bad, a demurrer does not admit the facts it alleges. In *Mico v. Morris*, the want of jurisdiction expressly appeared upon the record; and *Rex v. Danser* merely decides, that the court will not enforce an irregular judgment.

Cur. adv. vult.

The judgment of the court was now delivered by

Barr, C. J., who, after stating the pleadings, proceeded. We thought it a strong thing to say, that after a decision on the merits of his case in an inferior court, (for we cannot see that the decision turned on the point of jurisdiction,) a plaintiff should come forward to assert that the judgment was void, as being

coram non judice, and bring another action. But we must take it, that the facts stated in the replication are true, and if so, the inferior court had no jurisdiction; for the plaintiff not only avers that the parties did not reside within the jurisdiction, but also that none of the causes of action arose there; *both of which circumstances were necessary to confer jurisdiction; for the fact, that the goods were sold and delivered within the jurisdiction, and that the defendant was under a moral obligation to pay, would not of themselves render the court competent. However, at first, we were inclined to think that the plaintiff could not sue here, but on looking into the cases we find it impossible to get over them. *Mico v. Morris* was assumpsit brought in London for depasturing a horse in Essex: the defendant pleaded a judgment in his favour in a former action brought in the sheriff's court in London for the same depasturing. The plaintiff replied, that the cause of action arose in Essex, out of the jurisdiction of the sheriff's court; to which the defendant demurred:—The pleadings here are exactly the same, the only distinction being, that in *Mico v. Morris* it appeared on the face of the declaration, that the cattle were depastured in Essex out of the jurisdiction of the inferior court:—the superior court said the proceedings were void, and held the plea to be bad. The judges say, “the plea in bar is ill, for if the sheriff's court there holds plea of a matter out of their jurisdiction, their judgment is void and cannot be executed,” although CHARLTON, J., says, (which is very material,) “If the judgment in London had been given for the plaintiff, it would have been a bar here, because he had recovered and had a judgment for him:” But in *Frumpton v. Pettis*, 3 Levinz, 23, the defendant pleaded two several attachments of the money in London, one for part of the money due to himself upon obligation, the other for the residue upon an obligation to a stranger. The plaintiff replied, that the two obligations upon which the attachments were made, were made extra jurisdictionem cur. de London. The defendant rejoined, that the obligation to *himself was made infra jurisdictionem cur. de London. The plaintiff demurred, and upon argument it was adjudged for him. There it did not appear on the face of the pleadings that the cause of action arose out of the jurisdiction, and yet the court says, “Judgment there given of a thing out of their jurisdiction is absolutely void, and advantage may be taken thereof in pleading, without reversal by writ of error.” It is impossible to distinguish that case from the present. There is, however, another in the same book stronger still, *Adney v. Vernon*, 3 Levinz, 243, where, it not appearing in the plea that the cause was within the jurisdiction of the inferior court, the superior court held the whole coram non judice and void: they say, “It is true in the declaration set forth in the plea here, it is said to be infra jurisdictionem curiæ, but that is not sufficient, for that is traversable, but the matter in the declaration there is not traversable here, but only that which is alleged in the plea here.” There is also another case in 1 Roll. Abr. *Escape* F. pl. 3, where it was adjudged in arrest of judgment, that if the plaintiff, in an action upon the case in the King's Bench against an officer of an inferior court, for an escape, declare that he brought an action against J. S. in the said inferior court, (as in Kingston upon Hull,) upon an obligation made at Halifax in comitatu Eborum, (not alleging that Halifax is within the jurisdiction of the inferior court,) and that judgment was given, and execution awarded against J. S., who was taken in execution by the defendant and by him suffered to escape, wherefore the plaintiff has brought this action; this declaration is not sufficient to charge the defendant, because it is not alleged that the obligation was made within the jurisdiction of the court, for although the action be transitory, *yet as this inferior court has jurisdiction only over things occurring within the jurisdiction, the proceedings there were coram non judice et totum iustrementum vid. of which the officer shall take advantage in this action for the escape. The expression of the court there is extremely strong; that all

proceedings are oustement void; void to all intents and purposes. In the present case, therefore, our judgment must be

For the plaintiff.

THORNTON v. BOLAND.

Under the provisions of 52 G. 3, c. 39, the master of a vessel who discharged a cinque port pilot in Standgate creek, and dropped a mile down the port of Rochester with a signal flying for a Trinity house pilot, who came on board at Sheerness, was holden liable to a penalty.

THIS was an action brought to recover penalties alleged to have been incurred by the defendant under the 52 G. 3, c. 39, entitled "An act for the more effectual regulation of pilots, and of the pilotage of ships and vessels on the coast of England." At the trial at the Lent assizes, 1823, for Kent, a verdict was taken for the plaintiff for one penalty of 20*l.*, subject to the opinion of the court on the following case:

The brig *Archimedes*, whereof the defendant was master, arrived on the 26th of August, 1822, off Dungeness, in the course of her voyage from a port in the Mediterranean to the port of London. Williams Anthony White, then being a pilot duly appointed and licensed by the lord warden of the cinque ports, and constable of Dover castle, according to and for the purposes mentioned in the said act, went on board the brig for the purpose of piloting her during the time she remained within the limits of his license; and accordingly piloted *220] her into Standgate creek for the performance of quarantine, and remained on board there, acting as pilot until the 2d of September following; on which day she was discharged from quarantine, when the defendant insisted upon White's quitting the vessel. White offered to take charge of her for the Thames, and at first refused to give her up to the defendant; but on the defendant informing him, that he was directed by his owners to discharge White and take a Sheerness pilot, and giving him the following memorandum,

"Standgate Creek, Sept. 2d, 1822.

"These are to certify that the bearer, Mr. Williams Anthony White, was discharged from the brig *Archimedes*, in Standgate creek, by me, having an order from London to that effect, and not from any neglect of duty,

"JOHN BOLAND, Master,"

White, between two and three o'clock in the afternoon, unwillingly gave up the charge of the vessel to the defendant, the defendant then having distinct notice that White was ready and willing to take charge of the same for the Thames. The brig had a signal flying from ten in the morning for a pilot, and after White quitted her, the defendant twisted the jib for the purpose of canting her round, made sail out of the creek, and without having on board any duly licensed pilot, continued to drop, but always within the port of Rochester, for the distance of a mile, in the direction to the port of London: the brig was then brought to an anchor with her signal for a pilot still flying, Sheerness being distant about a mile and a half.

The defendant had been ordered by the quarantine master, to quit the creek, the quarantine having expired. He left the brig when she came to an anchor, *221] and proceeded in his own boat towards Sheerness. One Brown, *a pilot, duly licensed by the corporation of Trinity house of Deptford Strond, having come out of Sheerness, met him about half way between the vessel and Sheerness, proceeded with him to the ship, went on board and conducted her to Gravesend, and was paid 3*l.*, being the full pilotage of a Trinity house pilot from Standgate creek to Gravesend, whereas White's charge, as a cinque port pilot, would have been 3*l.* 17*s.* One Dunn, another pilot, duly licensed by the corporation of Trinity house, conducted the brig from Gravesend to London. The defendant, upon White's quitting the vessel, took, and

while she was proceeding as above the distance of a mile, kept the charge and conduct of her without being duly licensed to act as pilot, within the limits in which Standgate creek and the Medway lie.

The question for the opinion of the court was, whether the defendant, in so taking and keeping the charge and conduct of the vessel, did incur the penalty imposed on persons assuming or continuing in the charge or conduct of vessels, by the thirty-fourth section of the 52 G. 3, c. 39. If the court should be of opinion that he did, the verdict was to stand; but if the court should be of opinion that he did not, a nonsuit was to be entered.

By the 52 G. 3, c. 39, s. 2, it is enacted, that the corporation of Trinity house shall appoint and license persons duly skilled as pilots, "for the purpose of conducting all ships and vessels sailing, navigating, and passing up and down, or upon, the rivers of Thames and Medway, and all and every the several channels, creeks, and docks thereof, or therein, or leading or adjoining thereto, as well between Orfordness and London Bridge, as from London Bridge to the Downs, and from the Downs, westward, as far as the Isle of Wight, and in the English Channel, from the Isle of Wight up to London "Bridge;" and that the lord war- [222] den of the cinque ports, or his lieutenant, shall appoint and license persons duly skilled as pilots, "for the purpose of conducting all ships and vessels sailing, navigating, and passing from the westward up the rivers Thames and Medway; that is to say, from Dungeness up to London Bridge, and Rochester Bridge; and from the buoy of the brake to the westward, that is to say, from the said buoy to the west end of the Owers; all which vessels shall be conducted and piloted by such pilots, so appointed and licensed, and by no other pilots or persons whomsoever, &c."

Sect. 11 enacts, "That the master or other person, having the command of any ship or vessel coming from the westward, and bound to any place in the rivers of Thames or Medway, not having a duly qualified cinque port pilot on board, shall, on the arrival of such ship or vessel off Dungeness, and until she shall have passed the buoy of the brake, or a line to be drawn from Sandown Castle to the said buoy, (unless in the mean time she shall have received a proper cinque port pilot on board,) display and keep flying the usual signal for a pilot to come on board;" under the penalty of double the sum which the pilotage would have amounted to.

Sect. 12 enacts, "That if any cinque port pilot, taking charge of any ship or vessel into the Thames or Medway, shall quit such ship or vessel at Gravesend, or in any other part of the Thames, or in any part of the Medway before such ship or vessel shall have arrived at the place to which such ship or vessel is bound in the said rivers Thames or Medway, respectively, without the consent of the captain or other person having the command thereof, unless some other duly qualified pilot shall, with such consent come on board, and shall take the charge and conduct of such ship or vessel, for the "residue of the pilot- [223] age to be performed," he shall forfeit his pilotage, and be subject to other punishments.

Sect. 22 enacts, "That nothing in this act contained shall be construed to prevent any ship or vessel which shall be brought into any port or ports in England, by any pilot duly licensed, from being afterwards removed in such port or ports by the master or mate, or other person belonging to any such ship or vessel, and having the command thereof; or if in ballast, by any other person or persons appointed by any owner, or the master, or any agent of the owner, for the purpose of entering into or going out of any dock, or for changing the moorings of such ship or vessel."

Sect. 34 enacts, "That it shall be lawful for any licensed pilot to supersede any person not licensed as a pilot, in the charge of any ship or vessel within the limits of his license; and every master of any ship or vessel, who shall continue to act himself as pilot or who shall continue any unlicensed pilot, or

any licensed person, acting out of the limits for which he is qualified as a pilot, after any pilot licensed to act within the limits in which such ship or vessel shall then actually be, shall have offered to take charge of the ship or vessel; and every person assuming or continuing in the charge or conduct of any ship or vessel without being duly licensed to act within the limits in which such ship or vessel shall actually be, after any pilot, duly licensed and qualified to act in the premises, shall have offered to take charge of such ship or vessel, shall respectively forfeit, for every such offence, a sum not exceeding 50*l.*, nor less than 20*l.*."

Sect. 43 enacts, "That if any pilot, taking charge of any ship or vessel into the rivers Thames or Medway, shall quit such ship or vessel at Standgate creek, before such ship or vessel shall have arrived at the place to which such *224] ship or vessel is bound in the rivers Thames or Medway respectively, without the consent of the captain, or other person having the command thereof, unless some other duly qualified pilot shall come on board, and shall take the charge and conduct of such ship or vessel for the residue of the pilotage to be performed," he shall forfeit his pay or pilotage to Standgate creek, and be subject to other punishment.

By sect. 59 it is provided, "That nothing in this act shall extend to subject to penalties any master of any ship or vessel (not anchoring within the limits of any port or place for which pilots are or shall be appointed) who shall act himself as pilot in passing up and down the English channel, or elsewhere, in passing by any part of the coast of England, in the course of any voyage, or within the limits of the port or place to which his ship belongs, not being a port or place in relation to which provision hath heretofore been made by any act or acts of parliament, or by any charter or charters for the appointment of pilots, or who shall employ any person as a pilot, or who shall act himself as such, for the conduct of his ship or vessel in any case where and so long as a duly qualified pilot shall not offer assistance, or make a signal for that purpose." It is also provided that this act shall not extend to ships in distress.

Taddy, Serjt., contended, that the owners had no authority to dismiss the cinque port pilot after he was once on board, and that the only case in which a master could dispense with a pilot was under the twenty-second section of the act, in removing to go out of dock, or in dropping from one mooring to another, which there was no pretence for saying was the defendant's situation when he took Brown on board, and before that time he had proceeded more than a mile without any pilot.

*225] *Bosanquet*, Serjt., for the defendant. The cinque port pilot was competent to proceed to London, according to the provisions of the act, but the Trinity house pilot, coming on board at Standgate, who also entitled to do so. According to the language of the act, the cinque port pilot, having once come on board, could not quit the ship without the consent of the owner or captain, but it seems to follow as a necessary inference, that he might quit it with consent. As to the charge of proceeding without any pilot, the defendant was ordered, by the proper officer, to quit the quarantine creek; the signal for a pilot was flying from an early hour in the morning, and in that state the ship dropped a mile down the port of Rochester; there was no intention that she should proceed to London without a pilot, and the defendant, therefore, is expressly within the terms of the twenty-second section.

Taddy, in reply, was stopped by the court.

Bzst, C. J. The question in this case arises on the stat. 52 G. 3, c. 39, s. 34, and the determination of it is very important to the commerce of the country, and to the lives of the persons who are engaged in it. It appears that the respective duties of the cinque port and Trinity house pilots have been marked out by statute; the cinque port pilots conducting ships from the westward, and the Trinity house pilots from Orfordness, and the eastward.

The defendant's vessel came from the westward and was piloted into Standgate creek by a cinque port pilot. When, however, the captain was about to start from Standgate, he made a signal for another pilot, and ordered the cinque port pilot out of the vessel. It appears the cinque port pilot would have conducted the vessel to London, if he had been permitted, and according to the act, this might also have been done by a *Trinity house pilot had he come on board; but no Trinity house pilot came; and the captain, who had a [*226 right to retain the cinque port pilot, ought to have done so, having then no other pilot on board. Instead of this, he dropped down the port of Rochester, and piloted himself for a mile in an extensive harbour, where he might have encountered many perils; and the question is, whether he has committed an offence within the thirty-fourth section of the act, or whether he is excused by the twenty-second. I am of opinion, that he has committed an offence within the thirty-fourth, and is not protected by the twenty-second section. It has been urged, that this is a question of great importance to ship-owners, but it is of more importance to underwriters, who have a right to expect that they shall have the benefit of an experienced pilot during every moment of the voyage; and if they have it not, they are not fairly dealt with. The thirty-fourth section of the act imposes a penalty of 20*l.* on every master who shall conduct a ship in certain places without a pilot. The defendant, as master of a ship, conducted it in one of those places for more than a mile without a pilot: he is immediately within the words of, and the mischief proposed to be remedied by, the act; because if he might go one mile in search of a pilot, he might equally claim to go ten, and expose the underwriters to considerable risk. Under the twenty-second section of the act, a captain may remove his vessel without a pilot, upon going out of dock or changing moorings; but the defendant was not going out of dock or changing moorings; he was proceeding a mile on his voyage, and the underwriters were exposed to peril. It may be said this is a hard case upon the defendant; I think not; but this is immaterial, for the words and spirit of the act, the attention due to the interest of the owners and underwriters, and the lives of the crew, all require that a master should *not be allowed to discharge one pilot till he has obtained another of [*227 equal ability.

PARK and BURROUGH, Js., concurring,

Judgment was given for the plaintiff.

The KING v. The Sheriff of LONDON,

in a Cause,

LAZARUS v. J. H. F. TANNER and D. HERMANN.

Where a sheriff had taken a bail-bond executed by only one security, the court refused to set aside, even on payment of costs, an attachment which had issued against him for not bringing in the body.

Loss of a trial in term is loss of the term.

Lawes, Serjt., had obtained a rule nisi to set aside, on payment of costs, an attachment issued against the sheriff, for not bringing in the body.

Vaughan, Serjeant, opposed the rule, on the ground that the bail-bond was signed by only one of the bail named in it, and that the plaintiff had lost a trial at a sittings in this term.

Lawes, in support of his rule, argued, that the sheriff was not in default; that the bail-bond was given as a security to himself, and that though he might insist upon having two bail, he was justified in taking, at his discretion, only one. *Beaufage's* case, 10 Rep. 101. The loss of trial at a sittings in term, he said, was not material.

BEST, C. J. I am of opinion this bail-bond ought not to stand as a security,

*228] and the practice has been *long settled, that the loss of a trial in term is the loss of the term. How the practice originated is not material; but this is an application to our discretion, and ought we, in our discretion, to say, that this bail-bond should stand, where the sheriff has taken but one security. The party is not compelled to rely on such a bond, but may say to the sheriff, if you take only one security, I shall resort to you. It might lead to mischievous consequences if we were to decide otherwise, and sheriff's officers would be under frequent temptation to receive money for taking only one security.

The rest of the court concurring, the rule was

Discharged.

*229]

*RICHARDSON v. MELLISH.

The defendant having purchased twelve-sixteenths of the East India ship *M.*, commanded by the plaintiff, and chartered by the company for four voyages, proposed to the plaintiff, and the plaintiff consented, to resign the command in favour of the defendant's nephew, upon receiving in exchange the command of another ship, *E.*, then chartered for one voyage. If the company acceded to the exchange, it was agreed, that in case the nephew died or resigned before the expiration of the four voyages, the plaintiff should succeed him: as a further inducement to the plaintiff to resign the command of the *M.*, the defendant undertook to procure a beneficial alteration in the destination of the *E.*, and the person who negotiated the affair on the part of the plaintiff undertook (as he asserted, without the plaintiff's knowledge,) to pay the defendant 2000*l.* if the plaintiff should refuse to resign. The exchange was approved of by the company, and the destination of the *E.* altered. The plaintiff and the nephew sailed on their respective voyages. The plaintiff became bankrupt on his return from his voyage in the *E.*, and the nephew died in the course of his second voyage in the *M.* The defendant having refused to appoint the plaintiff to succeed him, was sued in assumpsit for breach of agreement, and the value of a voyage having been proved to vary from 4000*l.* to 8000*l.*, the jury gave 7500*l.* damages. On motion for a new trial and in arrest of judgment: *Held*,

First, That after verdict there was a sufficient consideration for the defendant's agreement.

Secondly, That the agreement was not illegal.

Thirdly, That books containing lists of passengers, deposited at the India-house pursuant to 53 G. 3, c. 155, were admissible in evidence towards showing the value of a voyage.

Fourthly, That the jury might give damages for the loss of the two remaining voyages, though the second had not been accomplished at the time of the action.

THIS was an action brought to recover damages for the breach of an agreement. The plaintiff was formerly captain of the ship *Minerva*, which had been chartered by the East India Company for six voyages to India. When the vessel had performed two of these voyages, the defendant purchased twelve-sixteenths of her, and having a nephew (Captain Mills) whom he wished to serve, he proposed that the plaintiff should give up the command of the *Minerva* to Captain Mills. In order to provide the plaintiff a compensation for this sacrifice, an agreement was entered into, by which it was stipulated, that the plaintiff should resign the command of the *Minerva* *to Captain Mills, *230] and should receive in exchange the command of the *Marquess of Ely*, another vessel belonging to the defendant, and then chartered for one voyage by the East India Company: that, provided the East India Company should accede to this proposed exchange, (a) and Captain Mills should be confirmed in

(a) Bye-law, c. 13, s. 11.

"Item. It is ordained that hereafter no owner or part-owner of any ship, or any commander or other person, shall directly or indirectly sell or take any gratuity or consideration, nor shall any person or persons buy, pay, or give any gratuity or consideration for the command of any ship or ships to be freighted to the company; and in case any such contract, payment, or gift shall be made, the commander or intended commander concerned therein shall from thenceforth be incapable of being employed or of serving the company in any capacity whatever, and it shall be lawful for the court of directors to discharge the ship from the company's service, if they shall think fit; and, moreover, the respective parties to such contract receiving, paying, or giving, or contracting to pay, receive, or give, shall severally pay damages to the company at the rate of double the sum received or to be received, paid, or given; and all the parties shall be obliged to discover such transactions as aforesaid, and all the circumstances relating thereto, by answer upon oath to a bill in equity, and shall not plead or demur thereto, and for that purpose proper clauses shall be inserted in all shipping agreements."

the command of the *Minerva*, and Captain Richardson in that of the *Marquess of Ely*, it was then agreed, that should Captain Mills die, or resign his command, before the remaining four voyages should have been performed by the *Minerva*, the plaintiff should succeed him in the command of that vessel. As it appeared, however, that the benefit to be derived from the command of the *Marquess of Ely* was a very inadequate compensation for the loss of the command of the *Minerva*, even for one voyage, the defendant undertook to procure the company's consent to change the destination of the *Marquess of Ely*, and to send her to India, with liberty of calling at St. Helena and the Cape; and on the other hand, Mr. Fletcher, who negotiated the agreement on *be- half of the plaintiff, undertook to pay the defendant a sum of 2000*l.*, [231 should the plaintiff refuse to resign his command of the *Minerva*; he asserted, however, that the plaintiff was ignorant of this undertaking. The exchange of commands having met with the approbation of the East India Company, and the destination of the *Marquess of Ely* having been altered, both vessels sailed on their respective voyages. The plaintiff's voyage in the *Marquess of Ely* having been peculiarly unfortunate, he became bankrupt soon after his return to England. It was proved by Mr. Fletcher, that, in consequence of a conversation between him and the defendant, in which the latter expressed his dislike of a captain being possessed of an agreement which he held as a rod over the head of his owners, the agreement was deposited with the defendant, who promised that it should be produced whenever it was required. While the *Minerva* was on her return to England, in the fourth of her six voyages, Captain Mills, then in the command of her, died, and another officer brought her home. The plaintiff then made a demand on the defendant, requiring to be reinstated in his command of the *Minerva*, according to the terms of their agreement; but the defendant having declined to comply with his request, and having sold the ship, the present action was commenced. These facts having been proved at the trial, before Lord GIFFORD and a special jury, at the London sittings after Hilary term last, the defence relied on was, that the agreement had not been merely deposited with the defendant, but had been positively given up to him, the plaintiff having renounced it on account of the advantage it was supposed he would have derived from the change in the destination of the *Marquess of Ely*; and evidence was adduced to show, that he had frequently spoken in warm commendation *of the defendant's conduct [232 towards him. The proof given at the trial of the value of one of these voyages consisted in the testimony of several captains, who described it as being worth from 4000*l.* to 8000*l.*, and in the production of a book containing a list of passengers, made by the captain, and deposited in the India-house, pursuant to the act of 53 G. 3, passed for the better regulation of passengers by India vessels. (a) This book was objected to at the trial, but was admitted in

(a) The 53 G. 3, c. 155, s. 15, enacts, "That no ship or vessel engaged in private trade under the authority of this act shall be permitted to clear out from any port of the said United Kingdom, or any place or places under the government of his majesty or of the said company situate more to the northward than 11° S. latitude, and between 64° and 150° E. longitude from London, until the master or other person having the command of such ship or vessel shall have made out and exhibited to the principal officer of the customs or other person thereto authorized by such government as aforesaid at such port of clearance, upon oath (which oath such officer or other person is hereby authorized to administer) a true and perfect list, in such form as shall from time to time be settled by the said court of directors, with the approbation of the said board of commissioners, specifying and setting forth the names, capacities, and descriptions of all persons embarked or intended to be embarked on board such ship or vessel, and all arms on board or intended to be put on board the same, or be admitted to entry at any port in the said United Kingdom, or any such port within the limits last mentioned."

Sect. 16 enacts, "That in every case where any such list shall be received in any port of the said United Kingdom from any master or other person having the command of any such ship or vessel, the officer or other person receiving the same shall and he is hereby required with all reasonable dispatch to transmit a copy of such list to the secretary of the court of directors of the said United Company; and in case such list shall be received in any port in the East Indies or other place within the limits last mentioned, such officer or other person

evidence by the learned judge. When about to sum up the evidence to the jury, he was interrupted by their *declaring themselves satisfied that the agreement had been merely deposited with the defendant, in compliance with his earnestly expressed wish. They then found a verdict for the plaintiff; and his lordship having told them, that if they did so, they were at liberty to give damages for the two voyages remaining to be performed when the plaintiff demanded the fulfilment of the agreement, they assessed the damages at 7500*l*.

The declaration was as follows: For that on, &c., at, &c., by an agreement then and there made, it was agreed between the plaintiff and defendant, that provided the defendant should purchase the East India ship *Minerva*, from Messrs. Smith, Timbrell, and Smith, of which ship the plaintiff was then commander, and provided the consent of the court of directors of the East India Company could be obtained to the exchange, the plaintiff would allow Captain John Mills to go as commander of the *Minerva*, upon condition that the defendant would give the plaintiff the command of the ship *Marquess of Ely* belonging to the defendant, and then taken up by the East India Company: it was also agreed between the said parties, that provided Mills should die, or should at any time thereafter not choose to proceed as commander of the *Minerva*, either upon that or any future voyage, the command of the *Minerva* should be given to the plaintiff, but only for his own personal use and not otherwise; provided he was in England, ready and willing to receive it in due time to enable the ship to proceed: it was also further agreed, that provided the court of directors should not assent to the exchange, the plaintiff should proceed for that voyage as commander of the *Minerva*, and immediately upon her return to England give up the command to Mills upon the same conditions, and with the same reversions as were *234] thereby agreed in the event of the *exchange being completed for the then present voyage; and further it was thereby declared and agreed that the agreement was intended to relate only to the four voyages next ensuing, for which the *Minerva* was then engaged by the directors; that until their expiration it was to be in full force and to have effect as to the reinstating the plaintiff in the command of the *Minerva*, under whatever circumstances might prevent Captain Mills from proceeding; and that, when she should have completed her next four voyages, that agreement was to all intents and purposes to be null and void: and the agreement being so made, afterwards and in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then and there undertaken, and faithfully promised the defendant, to perform and fulfil the agreement in all things on his part and behalf to be performed, the defendant undertook, &c., to perform and fulfil the agreement in all things on his part to be performed. And the plaintiff in fact saith, that the defendant did purchase the *Minerva* from Smith, Timbrell, and Smith; that the consent of the court of directors was obtained to the exchange; that the plaintiff did allow Mills to go, and he did go as commander of the *Minerva*; and that the defendant did give the plaintiff the command of the *Marquess of Ely*: and the plaintiff further says, that *before* the expiration of the four voyages for which the *Minerva* was engaged, and when two of the voyages remained to be performed, Mills died, whereof the defendant had notice; and although the plaintiff was then in England, and able, and ready and willing, and offered to take and receive the command of the *Minerva* in due time to enable her to proceed, and the plaintiff desired and wished to take the command thereof for his own personal use and not otherwise, and requested the defendant that the command *235] of the ship *might be given to him as aforesaid; and although the plaintiff hath always well and truly performed and fulfilled all things in the agree-

receiving the same shall and he is hereby required in like manner to transmit a copy of such list to the chief secretary of the government to which the port or place in which such list shall be received shall be subject."

ment contained on his part to be performed, yet the plaintiff in fact saith, that the defendant contriving, &c., did not, nor would when he was so requested, or at any time thereafter, give the command of the *Minerva*, nor was the same given to the plaintiff; and the defendant from thence hitherto hath wholly refused, and still doth refuse, to give the command, or to suffer or permit the same to be given to the plaintiff; and the command hath been given to another person for the two remaining voyages, by means whereof the plaintiff hath been deprived of certain pay, and divers great gains and profits amounting to 15,000*l.*, which would otherwise have accrued to him from the command of the ship.

Pell, Serjt., having in the last term obtained on several grounds a rule, calling on the plaintiff to show cause why a new trial should not be had, or the judgment be arrested,

Vaughan and *Bosanquet*, Serjts., who were to have shown cause, were stopped by the court, and

Pell, *Laues*, and *Wilde*, Serjts., were heard in support of the rule. They made five objections to the plaintiff's recovering; first, that the contract on record was without consideration; second, that the consideration, if any, was illegal; third, that the contract in evidence was illegal; fourth, that improper evidence was received; fifth, that the jury gave damages for the loss of two voyages, when it was not clear that the second could ever have been performed.

First, there was no consideration for the defendant's promise. The only consideration alleged is, that "provided the defendant should purchase the ship, the plaintiff would allow J. M. to go as commander; that is, [236 he would allow the owner of a ship to appoint his own commander: but the plaintiff had no interest to claim or communicate, and, therefore, had no right to insist on any such stipulation. A tenant at will, who is considered to have no interest, cannot make any stipulation concerning possession. 1 Roll. Abr. 23, pl. 27. [BEST, C. J. In the abridgment of the same case in *Viner*, 1 Vin. Abr. 309, it is said, if there be any doubt or dispute whether the party is tenant at will or for years, that is sufficient to constitute a good consideration.] But then the doubt ought to appear on the record, which is not the case here.

Secondly, the consideration, if any, is illegal, being a violation of the bye-laws of the company, a fraud upon other part-owners, and contrary to public policy. Under the bye-laws no person can make or take an appointment upon a valuable consideration, nor for more than one voyage at a time; and in *Card v. Hope*, 2 B. & C. 661, an appointment made for the benefit of one part-owner, without the knowledge and concurrence of the others, was holden to be void.

With respect to public policy the concerns of the East India Company stand on the same footing as those of the government, of which it has always been deemed a limb. *Blachford v. Preston*, 8 T. R. 89; *Card v. Hope*; *East I. C. v. Neave*, 5 Ves. jun. 173; *Thomson v. Thomson*, 7 Ves. jun. 470; *Morris v. McCulloch*, Ambli. 432; and by 49 G. 3, c. 126, s. 1. 3, 4, all the provisions of the statute of 5 & 6 Ed. 6, against the sale of, and bartering for, offices, are extended to offices under the East India Company. But the sale of an office of trust has always been deemed illegal. (*Blachford v. Pres-* [237 *ton*, and the cases there referred to by KENYON, C. J., and LAWRENCE, J.) A trust of higher importance than the command of an East India ship can hardly be found, considering the number of passengers and crew, and the amount of property entrusted to the captain.

Thirdly, the transaction between the plaintiff, defendant, and Fletcher, was clearly a promise of an appointment, made on a valuable consideration, if not a sale. By the agreement, as, indeed, by any prospective engagement, the defendant's discretion was shackled, and when a vacancy should occur, by the death of Mills, instead of looking out for a person fit to succeed him, he would be induced by the agreement to appoint the defendant, though he were, of all

persons, the most unfit, and even though he should labour under a disability, such as bankruptcy, which should render him unfit to be trusted with property to a large amount, and a person expressly excluded by the company's bye-law. But the plaintiff actually stipulated to pay money if he failed to carry his engagement respecting the command into effect, for Fletcher was the plaintiff's agent; and the promise by Fletcher to pay the 2000*l.* amounts to the same thing as a promise by the plaintiff, and avoids the whole transaction. As to the stipulation that the agreement should only be carried into effect provided the consent of the company could be obtained, that consent applied only to the exchange, and not to the subsequent appointment. The appointment, however, being illegal, for the reasons above stated, the consent of the company could not render it valid.

Fourthly, the captain's book, deposited in the India-house pursuant to the terms of 53 G. 3, c. 155, is not such *a public document as to entitle
 *238] the plaintiff to give it in evidence against the defendant. It is no more than the company's voucher for the conduct of one of their servants, and such its original purpose being satisfied, it is not producible as evidence on a transaction between individuals.

Fifthly, with respect to the damages, there was no proof that the plaintiff had lost more than one voyage, and a sum was given equivalent to the profits of two; but it could not be ascertained that the second would ever have been performed. According to the rules of the company a commander can only be appointed for one voyage at a time; and the plaintiff might have died, or have become incompetent, or the ship might have perished before the period for the second voyage arrived. On a bond conditioned for the payment of money by instalments, an action will not lie for the whole on the failure of one instalment.

BEST, C. J. The questions which we are to decide, are, first, whether the jury have been improperly directed as to the damages; secondly, whether evidence has been received which ought to have been excluded; thirdly, whether the contract, as it appeared in evidence given at the trial, was illegal; fourthly, whether the contract, as set out on the record, appears to be without consideration; and, fifthly, whether, if it contains a consideration, that consideration is illegal and void.

I will, in as few words as possible, address myself to every one of these objections. I agree, that if my Lord Chief Justice GIFFORD was not warranted in telling the jury that they might take into their consideration what would be lost by the voyage succeeding the first of which the plaintiff was deprived, the present verdict ought not to stand; because we are bound to *sup-
 *239] pose that the jury acted under that direction, and that part of the damages which have been given in this case (even though from the nature of the evidence we could not see that they had given damages for a second voyage) might have been given for a second voyage; and, therefore, that would have been a ground for a new trial. Was Lord GIFFORD, then, warranted in telling the jury that they might take into their consideration the second voyage, or was he bound to say, "all that you can take into consideration in estimating the damage is the loss of one voyage?" The argument that has been pressed on us to-day is, that they could only take into consideration one voyage, and there is a great deal of speciousness in it. It is clear that the plaintiff could only be appointed for one voyage, for the appointment of master is renewed every voyage. But though that is the case, may not parties look to that which is the practice of the East India Company, that though they renew the appointment, they renew it in the same person. If that practice be legal, may I not say, if you had appointed me for the first voyage, I should have continued for the second? You have deprived me of the profits I should have made not only on the first voyage, but on the second also. It requires no legal head to decide

this : common sense says, you are not to be paid for consequences which might not turn up in your favour ; but the plaintiff is entitled to have a compensation for being deprived of that which almost to a certainty happens in these cases. I am clearly of opinion that Lord GIFFORD was strictly warranted in telling the jury they might take into their consideration, that by the breach of this agreement the plaintiff had been not only clearly prevented going the first voyage, but in all probability prevented going the second ; and, therefore, in making up their minds on the damages, they ought to take into their *consideration that which he might have lost from the second. If my Lord GIFFORD [*240 had not told them so, I should have thought a new trial ought to be granted ; for he would not have presented the case to the jury in a manner that would enable the plaintiff to recover all that he was in justice entitled to. This case has been likened to the case of stipulated payments at different times ; there, undoubtedly, a new cause of action arises ; but here, the cause of action is complete, for the whole thing has but one neck, and that neck was cut off by one act of the defendant, which entitled the plaintiff to maintain this action. It would be most mischievous to say—it would be increasing litigation to say—you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action.

I come now to the next question, that is, as to the admissibility of evidence. For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of the 53 G. 3, c. 155, s. 15, 16. It is contended, that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. This is a public paper made out by a public officer, under a sanction and responsibility which impel him to make that paper out accurately ; and that being the case, it is admissible in evidence on the principle on which the sailing instructions, the list of convoy, and the list of the crew of a ship are admissible. But it may be said, Ay, but those are papers which come from government officers :—I go on,—but the books of the bank of England have been made evidence ; all those are evidence that are considered as public papers, made out by persons who have a duty to the public to perform, and whose duty it is to make them out *accurately. [*241 On account of that duty and responsibility, credit is given to them. These papers are of as high authority as any of those I have referred to ; higher than those of the books of the bank of England, the books at Lloyd's, or the lists of convoy, which have been received as evidence. These are papers which the captain is ordered by the fifteenth section of the statute, to which we have been referred, to make out upon oath, which oath an officer of the customs is authorized to administer :—for what purpose ? for the purpose of informing the East India Company (who, though subjects in England, are great sovereigns in India,) what kind of persons, and with what sort of arms these persons are going to settlements, the administration of the affairs of which is committed to them. If these are not public papers made with a view to great principles of public policy, I am at a loss to know what are public papers. If so, credit must be given to all papers so made : consequently these papers, I think, were properly received in evidence.

This brings me to the third question, whether there is any illegality in the transaction. I agree with the argument put to us, that if the defendant has clearly and satisfactorily made out by evidence a fraud in this case, or if it appears by the record in this case that this is a corrupt agreement, or that this agreement is manifestly in contravention of public policy,—whatever we may say as to the raising this objection, the objection must prevail. I am of opinion he makes out neither ; I am of this opinion, giving the fullest effect to the argument urged. When I come to consider the record, I see not the least pretence for this objection. It is said, it is a fraud on the East India Company, and that

it is a fraud on the co-owners. It cannot be a fraud on the East India Company, for they are apprised of the whole of the *transaction. They *242] knew that both these gentlemen were commanders of ships, and they knew that the whole effect of this contract (as far as we have any evidence of it on which the jury have acted) was to exchange the command of one ship for the command of another. Is there any thing on the face of it that is corrupt, illegal, or impolitic? For any thing that appears, in this transaction, from the testimony of Mr. Fletcher, this might have been done from a due regard to the service; from any thing that appears in this transaction, one of the gentlemen might have been deemed fit to command on one voyage, and the other fit to command on the other. On such grounds we are not to presume corruption. Corruption is to be made out. But I see no proof of any fraud or corruption. We have heard much of this being a contravention of public policy, and that, on that ground, it cannot be supported. I am not much disposed to yield to arguments of public policy: I think the courts of Westminster Hall (speaking with deference as an humble individual like myself ought to speak of the judgments of those who have gone before me) have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes, to decide doubtful questions of policy; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say, it is not a doubtful matter of policy that will decide this, or that will prevent the party from recovering:—if once you bring it to that, the plaintiff is entitled to recover; and let that doubtful question of policy be settled by that high tribunal, namely, the legislature, which has the means of bringing before it *243] all the considerations *that bear on the question, and can settle it on its true and broad principles. I admit, that if it be clearly put upon the contravention of public policy, the plaintiff cannot succeed: but it must be unquestionable,—there must be no doubt:—looking at all the facts of this case, I can see no unquestioned principle of policy that stands in the way of the plaintiff to hinder him recovering in this action.

I come, then, to the other observations which I shall make on this part of the case. Fletcher has stated a contract between him and the defendant, on which he may be indicted for conspiracy. The question is, does that corruption extend itself to the plaintiff? There is no evidence that it does; on the contrary, Fletcher's evidence distinctly is, that the plaintiff did not know of it. But it has been argued to-day, (and a reference has been made to another subject, to which I admit there is a fair analogy,) that though the plaintiff did not know it, yet that if his agent makes a corrupt contract, the principal must answer for all the consequences. It is not necessary for me to decide that point to-day. I am aware, certainly, that if the agent promises, the principal is liable. I do not say that there is not a great deal of weight in the analogy, but my answer to that objection is this, that that point was never raised at *Nisi Prius*. My Lord GIFFORD should have been desired to tell the jury, "Remember, that though corruption is not brought home to the principal, if it is brought home to the agent, that will be sufficient." To that point the attention of the jury was not called. In such a case as this we will not, where justice is all on one side, grant a new trial for the purpose of giving to the defendant an opportunity of raising that objection.

I come now to the points that have been made in arrest of judgment. I think *244] there is no foundation for *either of these objections: the first is, that no consideration appears on the record. I think there would scarcely have been ground for the objection if the declaration had been specially demurred to; but I am clearly of opinion there is sufficient in the declaration to raise a presumption of consideration after verdict. We were referred to a case yes-

terday in Roll. Abr. : I have looked at that case ; but in Vin. Abr. vol. i. p. 309, that case is also stated, and stated in the following terms, namely, that if a man is tenant at will, and makes a bargain with his landlord on the foundation of that tenancy at will, it is not a good consideration. No, for this plain reason ; because we always can take notice of the extent of the interest of a tenant at will ; we know that it is determinable at a word ; the breath of the landlord's mouth annihilates that tenancy in a moment. An agreement to hold, when the landlord might say, you shall not hold an instant longer, is no consideration. But the compiler of Viner says, if there be any doubt of the tenancy at will, it would have been a good consideration. It is not necessary he should have a right to hold, but if it be doubtful whether he had a right to hold, that is a good consideration. That answers the objection ; when he takes as a tenant at will, the law takes notice of what his interest is ; but we cannot take notice of the interest of a captain of an East India ship ; we cannot know that there might not be covenants which would secure him in possession of that for a great length of time. I think we should presume that after verdict ; I do not say this merely on my own opinion ; but I will state a case in which it appears to me the court presumed a great deal more after verdict. It *is *Evans v. ———*, 1 Vent. 211. "In an action upon the case : [*245 whereas the plaintiff pretended title to certain goods in the custody of one Susan Prickett, and claimed them to be his own, intending to remove them ; the defendant, in consideration that he would suffer them to continue there, assumed to see them forthcoming, and that they should not be embezzled, but safely kept to the use of the plaintiff, and shows that afterwards the goods were eloiigned, &c. ; upon non-assumpsit and verdict for the plaintiff, it was moved to stay judgment, that it doth not appear that the property of these goods was in the plaintiff, for it is alleged only that he pretended to them, and claimed them to be his own : sed non allocatur, for the declaration is full enough ; at least, it must be intended he proved they were his own, or the jury would not have found for him." May not we presume (after verdict) that the captain had a right to hold this ship against the defendant ? It appears the case I have cited is stronger. I think there is abundant consideration stated on the record in this case ; unquestionably, there is a consideration which will be sufficient after verdict. But then it is said, if there is any consideration it is illegal. Now we must look at the whole record, and see if it is so or not. It appears on the record that Mr. Mellish is sole owner, and therefore he could commit no fraud on co-owners. Could he commit a fraud on the East India Company ? For the reasons I have given, I think not. It appears to me the attention of the East India Company was called to the whole proceeding. Is there any fraud in the proceeding ? Sift it from the top to the bottom, what does it amount to ? Nothing more than this, that a man who has the sole interest in one ship, and is about to procure an interest in another, *makes a bargain with the captain of the ship to exchange it for another. Is there any fraud [*246 in that ? I say no. I am aware of the difference between a legal and a moral fraud. I see no legal fraud. I see nothing in public policy against this sort of exchange being effected. It appears to me there would be nothing corrupt,—nothing improper in it ; if not, then there is nothing to arrest the judgment on the ground of illegality. But we have been referred to many cases, and to an act of parliament. That act confirmed the view I had taken of the case. I had thought that a contract of this description was not to be set aside on what persons refining and refining might imagine to be fraud, but that there must be that clear, broad, palpable, corrupt proceeding which is spoken of in that act. That act shows the utmost extent to which the legislature intended to go, and beyond which we cannot go. In that act, which applies to offices of the East India Company, as well as offices under government, it is enacted that if there is a sale of any office, it is void. In every section it appears there must be

some corrupt pecuniary consideration. I agree that it is not necessary the party should directly get money by it,—if it is done circuitously,—if by the interest made, the pecuniary advantage can be got at, that will do. But the legislature never meant to carry this doctrine of corruption further; that is quite clear from the words they have used; for the word is “money;” and the terms relating to money are used in every section with that extent of phraseology which embraces every case, (whatever artifice is used,) where the basis of the transaction is corruption between the parties. That is the species of corruption which the act has described. That gives us the rule; beyond that we are not warranted in going; for if the legislature had thought that every bargain of this description was to be prevented, the legislature would not have said, you are to consider if there *is a mere pecuniary corruption, or something in the nature

*247] of pecuniary corruption, sufficient to avoid the bargain, but they would have gone on to say, there shall be no bargain, no tying up of the hands of those who have to do with the appointment to the command of East India ships—all those appointments shall be made without bias, the party shall come uninfluenced, and not restrict himself from appointing again as soon as the voyage is made. It is quite clear the legislature would use words of that sort if they had intended it. But they knew how impossible it was to regulate transactions by such visionary notions as these. They introduced only corruption as the thing which they could act upon, that is personal corruption, pecuniary advantage, or something in the nature of it. It is not proved that Captain Richardson ever did derive from this transaction any pecuniary advantage. It does not appear on the record that either of these parties is to derive from it any pecuniary advantage or emolument whatever. The act, instead of being an authority in favour of the defendant, is an authority against him. We were referred also to a great number of cases. I will not trouble the court with going over them, because I stated when they were cited it was unnecessary to cite them, as they only proved that to which the court acceded. I never have doubted that it is an offence at common law to sell offices. I have never doubted that if a man sells an office he cannot maintain an action growing out of such contract. That is all that has been decided by any one of the cases. The case of *Blachford v. Preston* was a direct sale. In *Card v. Hope* it was not a direct sale; it is distinguishable from *Blachford v. Preston* in that respect. It was decided on the principle of *Blachford v. Preston*. Why? Because in *Card v. Hope*, though there was not a direct sale, there was an indirect

*248] sale of the appointment. It was said to the plaintiff, if *you will buy these shares you shall be the captain. It will occur to every man, if the shares were sold under such circumstances, something was added to the price of the shares; it was a colourable sale of the command of a ship. There are expressions used by the chief justice in that case which seem to bear on the present; but the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. The manner in which he is arguing it is not the thing; it is the principle he is deciding. If ever I could have imagined it could have been extended to such a case as this, I would have protested against, though I could not have prevented the decision. I would in my place have protested against it, for I should have seen the injustice and confusion to which such a doctrine would have been liable to be extended. I am quite satisfied, that not one of the learned judges who decided that case ever conceived that its authority could be pressed to the extent to which it has been pressed in this case. All that was decided in that case was before decided in *Blachford v. Preston*, with this difference, in *Blachford v. Preston* the sale was direct, and in *Card v. Hope* the sale was indirect. All that the court decides in those cases is, that that species of sale is void in point of law. For

the reasons which I have given, I am decidedly of opinion that this rule for a new trial, and in arrest of judgment, ought to be discharged.

PARK, J. I am of opinion that none of the grounds taken for a new trial are tenable here. One of the points taken, and which would be a good ground for a motion, was, that Lord GIFFORD received evidence which he ought not to have received; that was a list of the passengers which was given in with a view to damages. Captains' charges vary according to the situations and capacities to *pay, of those who come on board the ship, and the situation they [*249 hold, either as cabin or steerage passengers. It is well known, that, according to the East India regulations, hardly a person goes to the East India settlements whose death (if death has taken place) is not immediately recorded in the East India Company's books. What is it that the act passed in the fifty-third of the late king has in view? It imposes on the captains of these ships the following regulations: The captain shall, on each voyage, under certain penalties, see that lists are transmitted to the India-house of all the passengers who go out in the particular ships: the words are, "names, capacities, and descriptions of all persons on board, or who shall have been on board, such ship or vessel, from the time of the sailing thereof to the time of arrival; and all arms on board, or which shall, during such time, have been on board, such ship or vessel, and the several times and places at which such of the said persons as may have died or left the said ship or vessel, shall have so died or left such ship or vessel, or such of the said arms as have been disposed of, have been so disposed of." What is the meaning of this? Are not these public documents? They are transmitted to the company for general inspection, and have become public documents, and have been so held by my lord chief justice, in the course of his judgment, as those which are received every day at Guildhall. On that ground I see no objection.

The next point was as to the extent of damages, and this branches itself into various considerations. It is argued, that the lord chief justice ought not to have directed the jury to find damages for the two voyages. Now, I am of opinion that he not only might, but that he was bound to do so. Where is the *objection? Unless there be something of illegality founded on the [*250 latter point, where is there any objection to a man's reciting in an agreement, that he has contracted with another, for four voyages? Those circumstances introduced in the argument, viz., the loss of the ship, that she might be wrecked, that the captain might die, and many other circumstances of that sort, if they had happened, might have been a good answer, for you cannot deal with impossibilities; and if Mr. Mellish could have shown these things, or that Captain Richardson had a "permanent infirmity," as it is called in an act of parliament, all that would have gone to the action itself. But then they say there is bankruptcy, and how could he contract under that disability? Is it to be supposed the company would allow a man under such circumstances to go on such a voyage as this? to which I answer this, (inasmuch as the agreement has this very proviso, "If the company shall agree to it,") if Mr. Mellish could have shown that on account of the company's refusal to let the bankrupt go, he could not comply with his contract, then the plaintiff could not have recovered; but Mr. Mellish has no right to defend himself by saying, that he has put it out of his own power to fulfil his engagement. I am of opinion upon that ground there is no colour for the objection.

The next point is a matter in which is introduced the question of legality. This is in arrest of judgment. Now, I agree with my lord chief justice, if there be corruption in the agreement, Mr. Mellish, being a defendant, has a right to take advantage of it, for in *pari delicto potior est conditio defendentis*. But I see no evidence to affect the plaintiff with that at all. I do not find that, but the contrary. We have been pressed with a variety of cases, two only of

which I will mention; the others really have no bearing. It is for the principle that I refer to those cases, and not for the facts. *The case of *Card v. Hope* is the last case, and *Blachford v. Preston* is the other; I concur, as far as is necessary, in the judgments given in those respective cases. The judgment given by my Lord Chief Justice ABBOTT was very elaborate; but though I concur with the judgment in that case, I am by no means prepared to agree with every dictum in that judgment. I am quite satisfied that the reference to general policy in that case, by my Lord Chief Justice ABBOTT, was going further than was absolutely necessary, and I think there is nothing here to show illegality. I enter no further into the question now than to say, that it strikes me the mutual engagements contained on the face of this agreement, declaring, that provided you will do so and so, I will do so and so, are a sufficient consideration to support the declaration. Is there any corruption in them? I cannot say that any thing is corrupt in the agreement, unless it be considered as corrupt, or as a wicked and a wrong thing for any man to appoint a respectable person, whose merits and abilities he knows, for a prospective voyage. I cannot go along with that. On the contrary, I am quite satisfied that if a man has an object in view, for such and such of his relations, or for any respectable man skilful in the navigation of ships, he may reasonably be anxious to secure his services for all the voyages that the ship has to perform under the company, provided they should consent. So far from thinking it an illegal consideration, it seems to me a most meritorious one, one which a sensible, prudent, judicious ship-owner would be very likely to act upon. For these reasons I am of opinion, the rule ought to be discharged.

BURROUGH, J. When they argued this case at the bar in arrest of judgment, it was said there was no *consideration, and if there was it was illegal. *252] Now the count happens to be framed in a way that avoids all possible question. It states the whole agreement as it existed, and then states mutual promises; and it is clear that there is something to be done on each side: the one is a good consideration for the other. Whoever reads the count will see something is to be done on each side; that has been held to be a good consideration. The declaration is framed upon that. Then the next point is, that it is illegal. I am of opinion, that on the face of this count there is no illegality. If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest, as my lord has done, against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail. Why should you not enter into such a contract, independent of public law? I know no law against it; I see no public policy against it at all. The legislature do not consider the East India Company as a public company; they may in some senses, but not in all. They have the exclusive trade to the East Indies, and employ persons (not in what may be considered as offices) to command ships; they own ships; all this is in the course of private trade, and so far public policy does not relate to such a subject. They have a right to make bye-laws to regulate that trade. As to the point of public policy, a great deal has been said, many cases have been mentioned, and in *Blachford v. Preston*, a great number of general phrases were made use of by the learned judge. But you ought not to govern courts of justice by general expressions used in the administration of the law. They may have some weight, but they ought not *253] to govern; you must *look to what the point of decision was. I only need read the point of decision from the digest of the case, which puts it out of question that it has any thing to do with this case. The Digest says, 1 Moore Dig. 361, "A sale (by the owner) of the command of a ship employed in the East India Company's service, without the knowledge and against the

bye-laws of the company, is illegal; and the contract of sale cannot be the foundation of an action." Every body knows, when you are on the bye-laws, when a party is contracting, with a view to the bye-law, a sale against it would be void. We know that all these captains of ships act under charter-parties; if the charter-parties incorporate the bye-laws in them, that is a matter which is to govern the contract; if they act against the bye-law, there is an end of the contract beyond all question. We then come to the bye-law itself: whoever looks at it will see that it has nothing to do but with pecuniary sales. Suppose the defendant is driven out of that, then he resorts to another point, under the act of parliament 49 G. 3. I know the act to which it relates was an act relating to the sale of public offices; the statute of Edw. 6. This act of 49 G. 3, is made to extend that act to other matters. What does it extend to? It extends to offices belonging to the East India Company. Who ever heard of the situation of a captain being an office? The East India Company stand in a two-fold situation, they are a trading company and they are a territorial company; and this statute relates to offices in the latter respect. It will turn out to have no relation to the office of a captain of a ship; that is an employment, not an office. Then we come to damages. It is enough to say, with respect to damages, that the contract is for four voyages, and the breach is, "you have by your own act, by the disposal of the ship, prevented the possibility of complying with your own contract. The question is, what damages shall be awarded for the breach of this contract? That the contract is broken, no one can doubt. You cannot appoint because you have sold your ship. The quantum of damages is for the jury; whether they give more or less is nothing to us. They have judged of that and have given 7,500*l.*, which goes to comprehend the whole loss of the first and second voyages. They may have given a greater part for the first and less for the second; they have given that sum, however, which does not seem more than they were warranted to give by the evidence. Then we come to the question as to the admissibility of evidence. Enough has been said on that subject; it is impossible to maintain any objection to the list of passengers. That list is made out under oath, it is preserved for public purposes, for the use of all the kingdom; for every individual. It is a public paper, and must be governed by the same rules as other public papers. Considering the whole of the case, it does appear to me, after all the arguments we have heard, that there is no ground for a new trial, or for arresting judgment.

Rule discharged.

*RUMSEY v. TUFNELL.

[*255

Semble, that under 43 G. 3, c. 46, expenses of execution include expenses of levying.—There is no statute of 29 Eliz.

THIS was an action against the sheriff of Essex, for alleged extortion in the execution of a *fi. fa.* against the plaintiff. The declaration commenced by stating, that by a certain act of parliament, made at the parliament of the Lady Elizabeth, late queen of England, at a certain session thereof, holden at Westminster, in the county of Middlesex, and begun on the 29th day of October, in the twenty-ninth year of her reign, entitled "an act to prevent extortion in sheriffs, &c., it was enacted, &c.," and then alleged that the writ against the plaintiff was endorsed, "to levy 7*l.* 12*s.* 6*d.*, besides interest, to accrue due on the sum of 7*l.* 3*s.*, from the 10th day of February, 1823, and besides, &c., *to wit*, *sheriff's poundage, officer's fees, and expenses of levying.*" At the trial, Essex Lent assizes, 1824, it appeared, that in fact the writ was endorsed, "Levy 7*l.* 12*s.* 6*d.*, besides interest, to accrue due on the sum of 7*l.* 3*s.*, from the 10th of February, 1823, and besides, &c." The warrant to the sheriff's officer was in the same words. Under this warrant the plaintiff's goods were, at his own

request, upon his agreeing to pay the usual charges, and upon his signing an authority, sold by auction, and the officer made deduction for the following charges :

	£	s.	d.
Levy fees, three journeys - - - -	2	2	0
Taking an inventory - - - -	1	1	0
Keeping possession fourteen days - -	2	9	0
Sheriff's poundage - - - -	3	8	6
Postage and expenses - - - -	0	4	6

*256] **A verdict having been found for the plaintiff, Lawes, Serjt., in the last term, obtained a rule nisi to set aside this verdict and enter a nonsuit, or to arrest the judgment, on the following grounds. First, that the endorsement on the writ, and the statute and common law, only authorized the sheriff's officers to levy the expenses of execution, and not the expense of levying; that the expenses of execution comprised only the costs of the writ, sheriff's poundage, and officer's fees; and that, therefore, where the declaration added "expenses of levying," it was a variance from the writ.*

Secondly, that the recital of the statute of Elizabeth was erroneous, as there was no session of parliament which commenced on the 29th of October, in the 29th year of Elizabeth.

Taddy, Serjt., who showed cause, contended, that since the 43 G. 3, c. 46 which authorizes the plaintiff to levy poundage, fees, and expenses of execution, over and above the sum recovered by the judgment, expenses of levying were expenses of execution within the spirit of that act; but that at all events those words having been inserted in the declaration under a scilicet, might be rejected as surplusage.

Lawes and Wilde, Serjts., were heard in support of the rule.

BEST, C. J. We ought to see our way clearly before we determine this to be a variance, which always goes against the justice of a case; and though it is sometimes difficult to make out the meaning of words in an act of parliament, I cannot think that "expenses of execution" means only the costs of the writ :

*257] but at all events, the *words introduced into the declaration are only surplusage, and may be struck out. However, as to the point urged in arrest of judgment, there is a case in 2 Bl. Rep., (a) and another in Anderson, which clearly show that there was no parliament-roll for the twenty-ninth of Elizabeth. Till the period when the day of passing the act was stated in the margin, acts of parliament had relation to the first day of the session, and the session in question commenced in the 28th of Elizabeth, 2 M. & S. 124. The rule, therefore, must be made absolute for the arrest of judgment.

PARK and BURROUGH, Justices, concurred.

Rule absolute.

(a) *Savage v. Smith*, 2 Bl. 1101.

*258]

ELWORTHY v. BIRD.

An agreement to discontinue an indictment (even supposing such an agreement to be legal,) can only be effected by the attorney-general's entering up a nolle prosequi.

ASSUMPSIT upon an agreement, in which one of the conditions precedent to, and considerations for, the defendant's undertaking, was, that all *indictments* which had been brought and preferred, and which were then still pending, for any matter or thing done or said by the defendant and his wife, or either of them, or by their respective relations and servants, or any or either of them, relating to or connected with the conduct either of the defendant or his wife, and all actions then pending against any other person, for criminal conversation with the defendant's wife, should be *discontinued*; and it was averred, that al

such indictments and actions "had been wholly discontinued, and not further proceeded with."

At the trial before *Bosanquet*, Serjt., Somerset Lent assizes, 1824, it appeared, that three indictments which were pending against the defendant at the quarter sessions, when the agreement was executed, had been afterwards removed by certiorari into the King's Bench, and that no nolle prosequi had been entered up, whereupon the learned serjeant thinking the plaintiff had failed to establish his averment respecting the discontinuance, directed a nonsuit.

Peake, Serjeant, having obtained a rule nisi to set aside this nonsuit,

Pell, Serjt., who was to have shown cause, was stopped by the court.

**Peake*, in support of his rule, urged, that an agreement to discontinue an indictment could not be taken in its strict technical sense, since [*259 no one but the attorney-general had authority to enter a nolle prosequi; but that the language of all contracts must be taken with reference to the subject-matter and the situation of the contractor, and all that was meant here was, that the prosecutor should abstain from taking further steps.

BEST, C. J. Discontinuance means putting an end to the prosecution; perhaps that cannot be done without a violation of law, and if so, this agreement was illegal; if it could be done, it has not been done in this instance, for the prosecutor might have caused a nolle prosequi to be entered up by means of the attorney-general, or he might have called the defendant into court, and omitting to adduce evidence, might have procured an acquittal. Whether an agreement to such effect would have been legal, I do not now decide. The discontinuance stipulated for in this agreement has not been effected, for the word means the same as in a civil suit; that is putting an end to the suit in a legal way. The present rule, therefore, must be

Discharged.

*MORISON v. GRAY and Another.

[*260

H. shipped goods at Dundee to the order of, and for P. in London. H. having ascertained shortly after the goods had been forwarded that P. had stopped payment, endorsed and forwarded the bill of lading to plaintiff, who demanded the goods of defendants, wharfingers, in whose custody they were.

Defendants having refused to deliver the goods to plaintiff: *Held*, that he had a sufficient title to sue for them in trover.

TROVER to recover the value of goods which defendants had received as wharfingers, at their wharf in London. The goods were shipped in January, 1823, by Haziell, a merchant at Dundee, by order of John Park, of London, merchant; but some days after the shipment Haziell ascertained that Park had stopped payment, and he then endorsed and forwarded the bill of lading to the plaintiff in London, with directions to take possession of the goods. The defendants refused to deliver the goods to plaintiff, but delivered them to one Pettitt, an insolvent to whom Park had transferred them. Haziell transmitted and returned to Park certain bills of exchange, with which he had paid for the goods.

At the trial before Lord GIFFORD (London sittings after last Hilary term) the plaintiff proved the endorsement of the bill of lading to himself, but omitted to prove that he had given any value for it, which the learned judge thought he ought to have established: he contended, however, that the whole transaction between Park and Pettitt was a fraud, and a verdict was found for him, subject to the defendant's moving to set it aside and enter a nonsuit on that ground.

Vaughan, Serjt., having obtained a rule nisi to that effect, was now called on by the court to support his rule. He contended, that the property was too clearly vested in Park to admit of Haziell's having recourse to a stoppage in transitu; but that even if he could have done this, it was a mere right which he

*261] could not *transfer; and therefore the action ought to have been brought in his name, and not in the plaintiff's, as the mere endorsement of the bill of lading to the plaintiff, without any valuable consideration, would not confer a sufficient property to enable him to sue in trover. It had never been contended, that the transfer of a bill of lading would, like the transfer of a bill of exchange, confer a right to sue. *Coze v. Harden*, 4 East, 211, and *Waring v. Cox*, 1 Campb. 369, were referred to.

BEST, C. J. This is a clear case, and distinguishable from that of *Waring v. Cox*, on the ground that, at the time of the plaintiff's demand, these goods were in transitu. It was set up as a defence, indeed, that the goods had been consigned to Park, and by him transferred to Pettitt; and if this was so, Haziell's right of stoppage and the plaintiff's right of action were gone: but we must assume, that the jury thought, upon the whole transaction, that Pettitt had no claim; and the only question for us after verdict, is, whether Haziell, having a right to stop in transitu, he has vested a right of action in the plaintiff by endorsement of the bill of lading. I agree with Lord ELLENBOROUGH, that it is not every transfer of such a bill which will transfer such a right; but this was a fair and usual transfer, and Haziell having a right to stop in transitu, ought not to have been compelled to go to London himself, but might, for the same purpose, invest the plaintiff with a right to the goods; and he could not do this more efficiently and correctly than by the general mode of transferring a bill of lading. By so doing he has conferred a special property in the plaintiff sufficient to entitle him to maintain an action of trover. The only ground for hesitation is

*262] that in *Coze v. Harden* the judges doubted whether such *an instrument could pass such a right. But the ground of decision in that case was, that the right of stoppage in transitu was at an end; here it continued. The doctrine touching bills of lading is of exceeding convenience to commerce; the owner cannot always follow his goods to a distance; he can only protect himself, in many instances, by transferring the bill of lading; and we should defeat the justice of this case if we were to hold otherwise upon the present occasion.

PARK, J. The only doubt which I have entertained was occasioned by what was hinted by the judges in *Coze v. Harden*; but the decision in that case turned on another point, namely, that the transitu was at an end; and it affords no authority for us to act on. There are many instances in which such a transfer as the present has been deemed sufficient to confer a right of action. In the present case justice has been done, and the verdict must stand.

BURROUGH, J., concurring, the rule was

Discharged.

REDFERN and Others v. SMITH.

The verdict for the plaintiff in a writ of waste ought to find the place wasted.

THIS was a writ of waste, upon the statute of Gloucester. At the Derby Lent Assizes, 1824, a verdict, under the direction of the learned judge who presided, was found for the plaintiff, damages 50*l*.

Vaughan, Serjt., for the defendant, obtained, last term, a rule nisi to set *263] aside this verdict and have a new *trial, on the ground that the jury ought, in this proceeding, to have found the place wasted, and that having omitted to do so, it was impossible to enter judgment on the postea. Vin. Abr. *Waste*, B. a; Fitz. Abr. *Waste*, pl. 111.

Pell, Serjt., showed cause, and cited *Greene v. Cole*, 2 Saund. 252, but

The Court held it was impossible the verdict could be sustained, all the entries being per visum juratorum, and finding the place wasted.

Rule absolute for a new trial, unless the parties should agree before the end of the term.

GREASLY v. CODLING and Another.

The being delayed four hours by an obstruction in a highway, and thereby being prevented from performing the same journey as many times in a day as if the obstruction had not existed, is a sufficient injury to entitle a party to sue the obstructor.

THE plaintiff declared against the defendants in case, for shutting, and keeping shut, a gate across a public highway, and thereby compelling the plaintiff, who was driving three laden asses, to go back and perform his journey by a very circuitous route.

The object of the action was to establish a right of way. At the trial, before HULLOCK, B., and a special jury, at the Nottingham Lent Assizes, 1824, the plaintiff, a retail coal-higgler, proved the right, and the disturbance of it by the defendants, as alleged in the declaration. It appeared that he was in the habit of passing up and down the road with coals; that upon the day in question he had been delayed four hours, and that he could *perform his journey [264 three times a day on the road in which he had been interrupted, but not so often by the circuitous route.

The learned judge directed the jury, that if a party had sustained injury or expense, by the obstruction of a public way, that was a ground of action; but that it would be outrageous if every individual could bring an action for every obstruction. The jury found a verdict for the defendants.

Vaughan, Serjt., in the last term, obtained a rule nisi to set aside the verdict and have a new trial, on the ground that the jury had been misdirected, and that the suffering of inconvenience would give the plaintiff a right to damages, although he should not have incurred personal injury or expense. He cited *Rose v. Miles*, 4 M. & S. 101.

Pell, Serjt., who showed cause against the rule, cited *Hubert v. Groves*, 1 Esp. N. P. C. 148; Year Book, 27 H. 8, 27, Moore, 180; *Fineux v. Hovenden*, Cro. Eliz. 664; *Paine v. Partrich*, Carth. 193; *Chichester v. Lethbridge*, Willes, 74, and Durnford's note to that case, to show that the mere inconvenience of delay was not a sufficient injury to entitle a party to sustain an action, but that he must allege and prove some further and special damage.

BEST, C. J. This is a rule calling on the defendants to show cause why the verdict found for them should not be set aside, on the ground of a misdirection by the learned judge who presided at the trial, and it appears to us that the direction was wrong, and that the verdict ought not to stand. On the declaration it appears that *the plaintiff possessed three asses, and was driving them along the public way: that while he was so using the way one [265 of the defendants shut a gate, and obliged him to take a more circuitous course; and this statement has been made out in evidence. The question, therefore, is, whether a man travelling along the high road, can maintain an action, (not, if he is stopped by the road being casually out of repair, but) if he is stopped by the hand of the defendant. We cannot determine here what was the object or end of the journey, or what injury the plaintiff sustained in the pursuit of that object,—that the jury must determine; but can he maintain an action for this obstruction? It has been contended he cannot, unless he proves a special damage; but even in a case of public nuisance, if any one has been distinguished in injury, he may sue the offender, and the many old cases which have been cited do not apply, because in those no special damage was alleged, whereas in the present it has been distinctly stated. In the case in Carthew, indeed, there is an expression in favour of the defendants, namely, that the action will only lie for a personal injury, and not for a mere injury by delay. I cannot see the difference, because injury from the one cause may be quite as prejudicial as injury from the other; but the ground of decision in that case was, that no special damage was stated. In *Rose v. Miles*, which was long subsequent to the case in *Espinasse*, Lord ELLENBOROUGH says, "This is something

more substantially injurious to this person than to the public at large, who might only have it in contemplation to use it, and he has been impeded in his progress by the defendants wrongfully mooring their barge across, and has been compelled to unload, and to carry his goods over land, by which he has incurred *266] expense, and that expense caused by the act of *the defendants: if a man's time or his money are of any value, it seems to me that this plaintiff has shown a particular damage." I cannot distinguish *Rose v. Miles* from the present case; in that, as in the present, the nature of the injury appeared upon record, and it resembled that of which the plaintiff complains, in all respects, except that the public way was a canal instead of a road, and the party was obstructed by a barge instead of a gate. The judges delivered their opinions seriatim, that where any damage was incurred, an action would lie. On the authority of that case, and the reason of the thing, this verdict must be set aside.

PARK, J. *Paine v. Partrich* is clearly distinguishable from the present case, for the thing complained of was only a common nuisance; the plaintiff had suffered no particular injury, and the judgment was given on that ground. The court said the action would not lie unless a particular injury had been incurred, and the expressions of the judges that seem to make for the present defendants, are only put by way of instance. But *Rose v. Miles* is precisely the same as the present case, and the plaintiff is, therefore, entitled to make his rule absolute.

BURROUGH, J. The question, in all these cases, is, whether the inconvenience complained of is general, or a particular inconvenience of the party complaining: that is the point of the decisions, and who can doubt about the particular injury in the present case? A man travelling with asses is stopped, and obliged to go by a circuitous course, with an obvious loss of time and profit; what distinction is there in principle between such a case and that of a man who is carrying 10,000*l.* worth of goods, to arrive by a given day, and is deprived of his market by an individual obstructing the *road: there was *267] no dispute about the facts, and the jury ought not to have found a verdict for the defendants.

Rule absolute.

HALL v. SMITH and Others.

Under the Birmingham paving act 52 G. 3, c. 113, some of several defendants in whose favour a verdict has been given, are entitled to treble costs, though the verdict may have gone against others.

By the Birmingham paving act, 52 G. 3, c. 113, s. 93, it is enacted, that, "in all cases where a verdict shall be found for any defendant or defendants in such action or suit, (viz. any action brought for any thing done in pursuance of that act,) or the plaintiff or plaintiffs therein shall discontinue the same after the defendant or defendants shall have appeared thereto, or be nonsuited, or if, upon demurrer, judgment shall be given against such plaintiff or plaintiffs, then, and in every such case, the defendant or defendants shall recover treble costs, and have such and the like remedy for recovering the same as any defendant or defendants hath or have for recovering costs of suit in any other case by law."

The present action was brought against certain commissioners under the act, and persons employed by them. A verdict having been found in favour of the commissioners, although the plaintiff recovered against some of the other defendants (see ante, v. ii. p. 156,) the prothonotary doubted whether he ought to allow treble costs to the commissioners who had obtained a verdict; whereupon

Pell, Serjt., obtained a rule nisi for the prothonotary to review his taxation, and allow the commissioners their costs.

*268] **Vaughan*, Serjt., who showed cause, cited *Dibben v. Cooke*, 2 Str. 1005, as an authority that acts giving costs are considered penal, and

argued that the court would not visit the plaintiff with a penalty for mere misjoinder; he contended that the clause was only intended to apply to cases in which, before the act, the party would have been entitled to single costs. If all had been acquitted, all had been entitled to treble costs, because it would have appeared that the action was vexatious, in which case only the penalty was meant to apply; but to give such a right there ought to have been an entire verdict.

BEST, C. J. This is an action on the case, and the question is, whether four of several defendants who have had verdicts in their favour, are entitled to costs. Before the statute of William, defendants who had so succeeded were holden not to be entitled, though they had suffered considerable evil, and had been dragged to the assizes, at great expense, without compensation. The statute 8 & 9 W. 3, was then passed, and was unfortunately holden, in *Dibben v. Cooke*, not to extend to actions on the case; but in all the actions to which it applied, if one of several defendants obtained a verdict he was entitled to costs. The words in this statute are much more extensive, and apply to every species of action. Now, if one defendant who has a verdict in his favour, is entitled to costs under the statute of W. 3, surely the defendants, who have succeeded in the present instance, are equally entitled, otherwise we should put on this act a more limited construction than on the act of 8 & 9 W. 3; but the words here are "in all cases where a verdict shall be found for any defendant or defendants in such action or suit."

***PARK, J.** If we were to put on this statute the narrow construction which has been contended for, we should defeat the intention of the legislature and renounce the very principle on which we have already decided in favour of these defendants. [*269]

BURROUGH, J. The ground of our former decision shows that these defendants are entitled to their costs now.

Rule absolute.

POCOCK v. BILLING.

Declarations of one who has been holder of a bill of exchange cannot be received in evidence, unless they were made while the party had possession of the bill.

THIS was an action on a bill of exchange, tried before Lord GIFFORD, C. J., at the London sittings after last Hilary term. *Pell*, Serjt., had obtained a rule nisi for a new trial, on the ground that the declarations of a former holder of the bill had been received in evidence, though it was not shown that he was in possession of the bill at the time he made the declarations.

Vaughan and *Bosanquet*, Serjts., showed cause; but it appearing, that, at the time of the declarations, the bill was not in the hands of the person who made them,

BEST, C. J., said, In order to render these declarations receivable, it ought to have been shown, that the party making them was the holder of the bill at the time; they are admissions, and as such, receivable only when they are supposed to be adverse to the interest of the party.

Rule absolute.

*JOHNSON and Another v. KING.

[*270]

A letter containing the terms of a contract between the plaintiff and defendant, concluded in these terms—"of this proposition, it is desirable that I have your answer per return, as I can have a vessel to charter at the price stated, who will not wait any longer for my answer, and failing him, I fear I should not be able to get another:"
Held, a mere request, and no part of the contract.

ASSUMPSIT on an agreement to deliver a certain quantity of coals. Breach,

non-delivery. At the trial before Lord GIFFORD, C. J., at the London sittings after Hilary term last, the various terms of the contract, as stated in the declaration, were proved by a letter from the defendant; but the letter concluded with the following words: "Of this proposition it is desirable that I have your answer per return, as I can have a vessel to charter at the price stated, who will not wait longer for my answer, and failing him, I fear I should not be able to get another;" and there was no averment in the declaration that the plaintiff had sent an answer per return.

A verdict having been found for the plaintiffs, *Vaughan*, Serjt., obtained a rule nisi to set it aside and enter a nonsuit instead.

Pell, Serjt., who showed cause, contended, that this was only a request, and no part of the contract; and the Court being also of this opinion, after hearing *Vaughan*,

Discharged the rule.

*271]

*EVANS v. SWETE.

An averment that Y. and R. became bail at the request of the sheriff, is satisfied by evidence that they became bail at the request of the sheriff's officer. The sheriff may put in bail before the return of the writ.

DECLARATION in trespass for false imprisonment.

Pleas, first, general issue; second, that a writ of *capias ad respondendum* against the plaintiff, returnable on the morrow of All Souls, at the suit of J. M. Taylor, was delivered to the sheriff of Middlesex, to be executed; that the sheriff, on the 3d of October, 1823, made his warrant thereon, and directed it to J. Wilson, the sheriff's bailiff; that the bailiff, on the 6th of October, arrested the plaintiff, who, thereupon, with one A. M., executed a bail-bond conditioned for plaintiff's appearance at the return of the writ; that the plaintiff did not appear, and that on the 6th of November the sheriff was ruled to return the writ; that before and at the time of the return, A. M. was an insolvent and in the King's Bench prison, and, thereupon, on the 7th of November, T. Y. and J. R. went before a judge at chambers, and became bail in the action; and then having apprehended the plaintiff, in order to surrender him in discharge of themselves, brought him to the defendant's house, to keep him in custody there till he should be surrendered to the Fleet prison.

Replication; that T. Y. and J. R. were not lawfully authorized and required to put in bail, but that they put in bail of their own wrong surreptitiously and fraudulently.

Rejoinder; that T. Y. and J. R. became bail at the request of the sheriff, and traversing the allegation, that T. Y. and J. R. were not lawfully authorized, and that bail was put in surreptitiously and fraudulently.

*272] *Surrejoinder; that T. Y. and J. R. did not become bail at the request of the sheriff.

At the trial before BEST, C. J., London sittings after Easter term. It appeared, that T. Y. and J. R. became bail at the request of Wilson, the sheriff's officer, and the plaintiff was thereupon nonsuited.

Cross, Serjt., obtained a rule nisi to set aside this nonsuit, on the ground, among other objections, that T. Y. and J. R. could not become bail, except at the request of the sheriff; that no such request was proved at the trial, nor any special authority from the sheriff to the officer to make such a request; and that in the absence of any evidence to such effect, the court could not imply that there was such a relation between the sheriff and his officer, as to enable him to do a thing which was beyond the power of the sheriff himself. The officer was not known to the courts as the sheriff's deputy. *Drake v. Sykes*, 7 T. R. 113.

Pell and *Wilde*, Serjts., who showed cause, maintained, that if the request

of the officer would not support this issue, nothing would, inasmuch as the sheriff himself never interfered in such cases.

Cross, in support of his rule, contended further at great length, that upon these pleadings the surreptitious and unlawful putting in of the bail, was as much a matter in issue as the request of the sheriff; and that as it had been already decided on motion in this cause, that the bail had been put in unlawfully,^(a) (according to which decision the plea itself was bad,) the plaintiff was entitled to a new trial.

**BEST*, C. J. No question is raised upon this issue but the request of the sheriff. To entitle him to raise the question of law, the plaintiff ought to have demurred to the plea. [*273]

PARK, J. On this issue the only question is a question of fact, whether or no there was a request on the part of the sheriff. It has been argued, that a special authority to the officer ought to be shown. We think such an authority has been shown. The sheriff gives a warrant to the officer, and there is sufficient evidence to connect him with the request.

BURROUGH, J. The sheriff is commanded to have the body at the return of the writ, but if he chooses to put in bail before the return, he may. The officer was acting for the benefit of the sheriff, in the regular course of his duty; and the fact of the request is sufficiently made out.

Rule discharged.

(a) See ante, v. i. p. 367, *Taylor v. Evans*.

GARLAND v. JEKYLL and Another.

A copyhold property, which when in the hands of a single owner, pays but one heriot, but pays several if divided among several owners, shall again pay but one heriot if it again becomes united in the person of a single owner.

THIS was an action of assumpsit for money had and received, and was tried at the sittings after Hilary term, 1822, before *DALLAS*, C. J., when a verdict was found for the plaintiff, subject to a case, in substance as follows:

In the manor of Weeks Park Hall in Essex, there are, and from time immemorial have been, divers customary *and heriotable copyhold tenements of inheritance, held by the respective tenants thereof unto them [*274] and their heirs and assigns by the rod, and by copy of the court rolls of the manor, at the will of the lord of the manor, according to the custom of the manor, by the rents, customs, and services, therefore due and of right accustomed.

There had from time immemorial been a custom within the manor for the lord for the time being, upon the death of every copyhold tenant of any customary and heriotable copyhold tenement or tenements within the manor, to take for heriots in respect thereof so many of the beasts which were of such customary and heriotable copyhold tenant at the time of his death, as the number of heriots due in respect of such customary and heriotable copyhold tenements did at that time amount to: and it was contended at the trial, that the custom was for the lord of the manor to take for heriots such beasts which were of the tenant at the time of his death as were then the best beasts, or such as the lord should elect to take as the best.

In 1735, Samuel Warner was a copyhold tenant of two customary and heriotable copyhold tenements within the manor, which he held, and was seised of to him and his heirs by the rod, and by copy of the court rolls of the manor, at the will of the lord, according to the custom of the manor, by the rents, customs, and services, therefore due, and of right accustomed, viz., one copyhold tenement, consisting of three parcels of land with the appurtenances, parcel of Westland, customary and heriotable, containing about nine acres, abutting upon lands called Edmund's Lands; and another copyhold tenement, consisting of

two pieces of land, another parcel of Westland, being customary and heriotable, containing about ten acres, abutting upon Derryhill-hall ground.

*275] In the same year Warner died so seised of and holding the copyhold premises as above; and the following presentments, surrenders, admissions, and other proceedings respecting the said and other copyhold premises afterward took place at divers courts baron of the manor, and entries thereof, and of the divers heriots and rents payable in respect thereof, were made in the court rolls as follow :

5th June, 1735.

Death presented of Warner seised of the above-mentioned copyhold premises, and finding of jury that by his death there happened to the lord two heriots, (two cows, value about 5*l.*.) and proclamation thereon made.

6th October, 1735.

Separate admission of Catherine Graham to one undivided fourth of the same premises, as her right and inheritance as one of the four daughters and coheirs of Warner, to hold to her, her heirs, and assigns for ever, as her right and inheritance, of the lord, at the will, &c., according to the custom of the manor, by the rents, customs, and services therefore due and of right accustomed, and a fine of twenty guineas was set on the whole premises.

Same admission of Mary Warner.

Same, Eleanor Warner.

Same, Ann Warner.

15th September, 1736.

Death of C. Graham presented, with general proclamations.

6th September, 1737.

Death of Mary Warner, presented as seised of an undivided fourth part of the premises, and that Eleanor and Ann Warner were her sisters and coheirs; but whether she left any heriot at the time of her death the homage knew not. Proclamation made.

*276] Also a rental of the several sums yearly issuing out of, and payable from the freehold and copyhold lands and tenements holden of the manor, made and reserved on the inspection of the ancient rolls, rentals, and examination of the ancient tenants at a court holden of the manor 26th September, 1737, before William Mayhew, gentleman, steward.

Inter alia.

Tenants' Names.	What they hold.	No. of Acres.	By what Rents.	When admitted.	What Heriots due.
Ann Warner, spinster,	Holds to her and her heirs for ever one undivided fourth of three parcels called Westland, heriotable, containing by estimation,	9	3 9	6th Oct. 1735.	1
Eleanor Warner,	Also, one undivided fourth part of two other pieces of land, parcels of Westland, heriotable, containing by estimation,	10	3 9		1
Mary Warner,	Holds another fourth part of the same.				
Graham Catherine, late Catherine Warner, spinster,	Holds another fourth part of the same.				
		19	7 6		2

14th November, 1737.

Kitty, the wife of Langhorn Warren, clerk; Eleanora, the wife of William Bunbury, clerk; Ann Graham, spinster; and John Elliston, an infant son of John Elliston by Sarah his wife, late Sarah Graham, spinster, were severally admitted at their own desire as tenants in common, and not as joint tenants, to one undivided fourth part of a fourth of said premises of which Catherine Graham lately died seised, as her coheirs.

*To hold unto them, their heirs, and assigns respectively, for ever, by the rents, &c., and they gave the lord for their several fines as per margin. (None appear, nor claim of heriot.) [*277]

23d May, 1738.

Kitty Warren surrendered to the use of her will notwithstanding coverture.

18th January, 1743.

After reciting the admission of Catherine Graham, Mary, Eleanor, and Ann Warner on the 6th October, 1735, as the four daughters and coheirresses of Samuel Warner, and the entries of 15th September, 1736, and 14th November, 1737,

The death of Mary Warner was presented, and that at the time of her death she was seised of one undivided fourth of the said premises, and that John Elliston the infant was also dead, seised of a fourth of the said premises, to which his mother was entitled after the death of Catherine Graham; but whether either of them left any heriot the homage knew not.

Admission thereon of Eleanor and Ann Warner, spinsters, and Kitty Warren and Eleanora Bunbury, as follows:

Eleanor and Ann Warner each to an undivided third part of a third part of that fourth part of the said premises of which Mary their sister died seised; and Kitty Warren, Eleanora Bunbury, and Ann Graham, were each admitted to a third of that fourth of a fourth of said premises to which John Elliston, their sister's son, was admitted and died seised of; and also each to a third of a third of that fourth of which Mary Warner, their aunt, died seised.

To hold to Eleanor and Ann Warner, Kitty, Eleanora, and Ann Graham respectively, and to their respective heirs and assigns for ever, of the lord, &c., according to the custom, &c., fines as per margin. (None appear.)

*Same court. Eleanor and Ann surrendered to the use of their respective wills. [*278]

2d February, 1743.

Kitty surrendered to the use of her will.

3d May, 1762.

Death of Lady Eleanora Bunbury presented, seised of said undivided parts, and proclamation made.

14th March, 1763.

Death of Kitty Warren presented, seised, &c., the homage are informed that Erasmus Warren, clerk, is her only son and heir; but whether she left any animal to seize for a heriot they know not.

14th September, 1763.

After reciting admissions of Eleanor Warner on 6th of October, 1735, and on 18th January, 1743,

Presenting her death, seised, &c., and that Ann Warner was her sister and heir; but whether she left any animal as a heriot was not known; Ann was admitted under the will of Ellen to all her shares of the premises, to hold to her, her heirs, and assigns of the lady, &c., and paid for fine as per margin. (Fine for the fourth five guineas; for the other parts 11s. 6d.)

Same court, Erasmus Warren, clerk, only son and heir of Kitty Warren, and devisee under her will, was admitted to her shares. To hold to him and his

heirs for ever, of the lady, and paid for fines as per margin. (Fine in the whole 2*l.* 4*s.* 10*d.*, saving to the lady the rights of heriots, &c.)

Same court. Thomas Charles Bunbury was admitted as only son and heir of Eleanora Bunbury to all her shares of the premises, to hold to him and his heirs, as his right and inheritance, of the lady, &c., and paid the several fines that appear in the margin. (Fines in the whole 2*l.* 4*s.* 10*d.*)

*2d June, 1773.

*279] *Recital of the admissions of Ann Warner. Presentment of her death, but who was her next heir, or whether she left any animal to seize as an heriot the homage know not.

27th August, 1773.

After reciting the death of Ann Warner, Thomas C. Bunbury was admitted as one of the heirs at law of Ann Warner to one undivided third part of a fourth part of the premises to which she was admitted on the 6th of October, 1735, as one of the daughters and coheirs of Samuel Warner; and also to a third part of a third of a fourth to which she was admitted on the 18th January, 1743, on the death of Mary Warner, her sister; and also of one other third part of a fourth to which she was admitted, under the will of her sister Ellen, on the 14th September, 1763, to hold the said parts, &c., to him, his heirs, and assigns for ever, as his inheritance at the will of the lord, for fine as per margin. (Five guineas.)

Same court. Admission of Ann Hanmer, wife of Walden Hanmer, to same proportions, as one of the heirs at law of Ann Warner, to hold in like manner; fine as per margin. (Five guineas.)

Same court. Admission of Erasmus Warren, clerk, as one of the heirs at law of Ann Warren, to hold as above; fine as per margin. (Five guineas.)

Also at this court the homage find and present that Sir Thomas Bunbury and W. Hanmer, executors of the last will and testament of Ann Warner, paid to the lord of the manor 10*l.* 10*s.*, as a composition for the heriots due upon her death.

23d October, 1778.

Presentment of the death of Ann, wife of W. Hanmer, and that she died seised of certain parts of shares of the said premises; proclamation made.

*30th June, 1780.

*280] Recital of the admission of Ann Graham, afterwards wife of Walden Hanmer, afterwards Sir Walden, on 14th November, 1737, her admission on 18th January, 1743, also her admission on 27th August, 1773; also death, &c.: and that Job Hanmer, as one of the sons of Ann, and devisee named in the will of Ann Warner, his late aunt, claimed to be admitted to all the said parts, and was admitted thereto, to hold to him and his heirs of the lord, &c.; which said several shares amount in the whole to one third of the estate; fine as per margin. (5*l.* 15*s.* 6*d.*)

13th July, 1807.

Death of Erasmus Warren presented, seised of divers lands, or parts, or shares, on 8th December, 1806, and that divers heriots had become due to the lord on his death; but whether he died possessed of any beast or animal homage know not.

6th June, 1809.

Recital of the admission of Erasmus Warren on 14th September, 1763, after the death of, under the will, and as only son and heir of Kitty his mother; and also his admission on 27th August, 1773, as one of the heirs of Ann Warner; whereupon Henry Warren was admitted as the youngest son and heir, according to the custom of the manor, to all the undivided parts and shares to which his father was so admitted, to hold to him, his heirs, and assigns, of the lord, &c.; fine as per margin. (15*l.*)

And was admitted tenant, subject to any heriot or heriots of which Erasmus might have died possessed, or to a composition or compositions in lieu thereof

18th August, 1814.

Death of Job Hanmer presented, reciting his admission on 30th June, 1780, to divers parts and shares, *constituting in the whole one third of the said premises, (naming them,) leaving Job Hanmer, his youngest son [*281 and heir according to the custom of the manor; but whether he left any heriot the court is not informed.

These were the entries relied on as constituting the title of Sir C. Bunbury.

To prove the custom contended for, the following entries were also added.

17th December, 1731.

Recital that Robert Francis and Ann his wife were admitted, after a recovery for their lives, remainder to the heirs of Ann, to Gaell's and Webb's;—death of Robert, he having survived Ann;—seizure of a mare for heriot for Gaell's;—that Mary, the wife of Benjamin Seabrooke, is heir of Ann;—that Mary says that she had a sister Ann, late wife of William Smith, who died, leaving William Smith her only son, and prays to be admitted to a moiety of Gaell's holden at 1s. rent, and to a moiety of Webb's holden at 10s. Admittance accordingly. Fine 18l.

Surrender by Mary, to the use of Benjamin Seabrooke for life, and to the use of her will. Admission of William Smith to a moiety of Gaell's and of Webb's.

21st August, 1752.

Presentment of the death of Mary Jennings, late Seabrooke, being a feme covert: no heriot left. Admission of Frances Rouse, under the will of Mary Jennings, to a moiety of Gaell's and of Webb's. Fine 18l. Surrender to the use of the will of Frances Rouse.

2d October, 1802.

Presentment of the death of Frances Rouse, and proclamations. In the margin the words "Heriots due."

*22d July, 1791.

Presentment of the death of William Smith: whether he left any animal [*282 as heriot homage do not know. W. Smith, his eldest son, brings in his will, by which his half of Gaell's and of Webb's was devised to the son in fee. Admission of W. Smith, under the will, to the half of Gaell's and of Webb's: he pays for fine 21l. and compounds for heriots as in the margin. (Heriot for Gaell's, 5l. 5s.: to be paid for Webb's, 5l. 5s.)

6th October, 1735.

Proclamation for heirs of Rebecca Dagney, formerly Carrington. Isaac Dagney, her husband, informs the steward that he had issue by her one daughter, Rebecca. Admitted tenant of the curtesy to Waylett's, holden at 8s. rent, and also to lands called Gaell's, at 1s.

14th April, 1777.

Presentment of the death of Isaac Dagney, seised of Waylett's and Gaell's, and that his daughter, Rebecca, had two daughters, Mary Mitchell and Sarah Million. Dagney had no animal to seize. Admission of Mary Mitchell to a moiety, on fine of 9l. 9s. Surrender to the use of her will. Sarah Million admitted to another half; fine 9l. 9s.

8th April, 1779.

Thomas and Mary Mitchell surrender half of Waylett's and half of Gaell's, to Stephen Durrant, and his heirs, who is admitted; fine as in the margin. (No fine in the margin.) Durrant surrenders to the use of his will.

4th April, 1788.

Presentment of surrender out of court, of Samuel Leager and Sarah his wife,

late Sarah Million, to Durrant, of the half of Waylett's and the half of Gaell's. Durrant is admitted, and surrenders to the use of his will.

13th July, 1807.

*283] Recital of a surrender in 1775 to Durrant of Lipstone's *by Drewell ; and in 1778, of a cottage by Houghgrove ; his admittance in 1779 to a moiety of Waylett's and Gaell's ; and in 1795, a surrender by Jessup of another cottage to Durrant, and his admission ; then that he had surrendered all these premises to the use of his will and died—the homage present, that there was due on his death five heriots, which were compounded for at 75*l.*, and Sarah Lott was admitted under his will.

Sir T. C. Bunbury having made the defendants executors of his last will, died in 1821, being at the time of his death a copyhold tenant of the manor ; seised of and holding the copyhold estates to which he had been admitted as mentioned in the abstract ; and the owner of divers horses, twenty-six of which were at Barton, in Suffolk. The plaintiff being then lord of the manor, claimed twenty-two of the best beasts which belonged to Sir T. at the time of his death, as heriots, and sent his bailiff to Barton to take an account of such heriots, when an account, comprising the twenty-five horses which were there, and five others which were at Newmarket, was delivered to him by Sir T.'s groom. Twenty-two lots of the horses which were then at Barton, were afterwards, by agreement between the parties, sold at Tattersall's by the defendants.

The question for the opinion of the court was, whether plaintiff, as lord of the manor, was, upon the death of Sir T. C. Bunbury, entitled to more than two heriots ? and if to more than two, to how many ? in respect of the several copyhold premises whereof Sir T. C. Bunbury so died seised, not exceeding fourteen in the whole.

Taddy, Serjt., for the plaintiff. The plaintiff claims as many heriots as there have been distinct holdings of the property in question, and at all events he is *284] entitled *to four. If the hardship and inconvenience resulting from a decision to this effect be great, that is a matter to be remedied by the legislature, but according to established decisions, nothing can be more clear, that where copyhold property is holden by heriot service, several heriots are payable upon the division of the property into several estates, and several heriots having once been paid, continue payable though the property should be afterwards reunited. *Attree v. Scutt*, 6 East, 476, is expressly to this effect in the case where the estates reunited belonged to tenants in common ; and though it will be attempted to distinguish the present case, on the ground that the estates reuniting in Sir C. Bunbury belonged, when separate, to coparceners, yet it will be found, that as far as the interest of the lord is concerned, the estate of a coparcener stands upon the same footing as that of a tenant in common, (Co. Cop. s. 56,) Co. Lit. 185 a ; Lit. s. 286, note 9 ; Calh. Cop. 64. 66 ; *Bruerton's case*, 6 Rep. 1. Joint tenants are seised per mi et per tout ; tenants in common have each a part ; one tenant in common, therefore, may enfeof another, but cannot release to him, while one joint tenant may release to another, but cannot enfeof ; but a parcener may do both or either. (Co. Lit. 164 a.) Although, therefore, parceners may have a joint estate with respect to a stranger's præcipe, they may treat it as several among themselves, because otherwise one could not enfeof the other : in the present instance they have so treated it, and therefore, however in any other case it might be open to the parties to argue,—that though the lord may be entitled to several heriots where the severance of estates has been effected by act of the parties, he is not so entitled where the *285] severance has been by act of law,—they are estopped *to use any such argument here, because they have severed the coparcenary, and have become tenants in common by their own act and desire. In 1737, the four daughters of Samuel Warner pray to be admitted as tenants in common and not

as joint tenants, and they are admitted accordingly. Now every admittance is a bargain with the lord, amounts to a grant, and may be pleaded as such (Co. Cop. s. 41); and the descendants of Samuel Warner cannot be permitted, at the expiration of nearly a century, to say that their ancestors have mistaken the nature of their estate, and to claim in opposition to a written and recorded grant. A conveyance by several tenants in common is a conveyance of several estates, and the lord shall not be prejudiced by their reunion; if, indeed, a reunion be effected, which is not altogether clear, since it has been often laid down that a man may be tenant in common with himself: as where one who is tenant in common with a bishop, conveys to the bishop in his natural capacity; the bishop in his episcopal capacity becomes tenant in common with himself in his natural capacity. Co. Lit. 190 a. By the decision, therefore, of *Attree v. Scutt*, and the act of the parties which has brought them directly within the terms of that decision, the plaintiff in the present case is entitled to twenty-two heriots.

Bosanquet, Serjt., contrà. It has been repeatedly laid down, that heriot custom is *magis de gratiâ quàm de jure*. (Bracton, lib. 2, c. 36, s. 10; Fleta, lib. 3, c. 18; Britton, c. 69.) The custom, therefore, to take several heriots after the reunion of several estates, ought expressly to appear; no such custom, however, can be collected from the court rolls in the present instance, and even if it were so where tenancies in common have existed, it is not so with regard to estates which have been holden in coparcenary, for all the coparceners *constitute but one heir, (Com. Dig. *Parceners*, A 3; Co. Lit. 163 b;) [286] they must join in suing a disseisor, and if they recover, are jointly seised again, (Co. Lit. 164 a.) So long as the coparcenary continues, no heriot at all is due upon the death of one coparcener; for heriots are only due where a person dies solely seised, (Kitchin on Courts, tit. *Heriot*, 269;) and as coparceners are seised *per mi et per tout*, (Lib. ass. Easter, 34 Ed. 3, pl. 15.) and constitute but one heir, (Lit. s. 313; Co. Lit. 163 a.) when one dies there is no vacancy of tenure. The seisin of many constitutes but one tenancy, 3 Leon. 13; and the possession of one is a seisin to make a descent to the other, *Doe d. Barnett v. Keen*, 7 T. R. 386. There is no authority for saying that the case is altered by the circumstance of the coparceners having been admitted severally; such an admission does not operate as a partition; till which, the estate continues in coparcenary. Even supposing that several heriots were payable upon the death of each coparcener severally admitted, it by no means follows that a multiplicity of heriots should afterwards be paid upon the reunited portions. But the present plaintiff has no pretence for his claim unless he shows a custom to that effect; and also, that by the several admissions the tenure of the estates was altered from a tenancy in coparcenary to a tenancy in common. Now there was no act *inter partes* to produce such an effect; it would be prejudicial to the tenants; and it is established, that an admission operates not according to the terms of the admission, but according to the terms of the surrender and the actual title of the party admitted; *Westwick v. Wyer*, 4 Rep. 28 b; Co. Cop. s. 41; *Rawlinson v. Greeves*, 3 Bulstr. 240; *Baddeley v. Leppingwell*, 3 Burr. 1543; *Roe d. Noden v. Griffiths*, 5 Burr. 1961; *Church v. Mundy*, 12 Ves. 431; *Right d. Dean and Chapter of Wells v. Bawden*, 3 East, 260. Therefore, *though the daughters of Samuel [287] Warner claim to be admitted severally, it appears clearly from the whole of the court roll, that they are admitted as co-heirs by descent, at one court, and upon paying one fine for the whole property. The result of all the entries is, that Sir C. Bunbury died seised of his shares by descent and as a parcener. It is true, that under the devise by Eleanor Warner to Ann Warner, Ann Warner took her sister's share as a purchaser, and held them in common with herself and the other coparceners, (Lit. s. 304;) so that, if the dictum in *Attree v. Scutt* be law, the heriots might be doubled by the devise, and two might be payable at the death of Ann Warner; but the coparcenary as to the rest remained

undisturbed, (Co. Lit. 193; Lit. s. 304. 312,) and Sir C. Bunbury took all the shares of his aunt as a parcener. However, the case of *Attree v. Scutt* did not relate to heriots; the doctrine contained in it is not applicable to a case, where, as in the case of parceners, the separation and reunion of estates are both the act of law, and not the act of the parties; and the decision itself proceeds solely on a case in Fitzherbert, not applicable; for that was a case of an entire service, the division was the act of the parties, and it is stated to be the abridgment of a case in the year books, Hil. 34 Edw. 3, which cannot be found there, or in Brooke's Abridgment: in *Bruerton's case* and *Talbot's case*, 8 Rep. 206 b, it is cited only from Fitzherbert. Such a decision cannot consist with the ancient common law, as may be inferred from the effect it would have had upon a holding by knights' service. As if the tenant were to furnish one knight for forty days, and upon a division into moieties, each tenant were to furnish one for twenty days; upon further subdivision, the lord, instead of obtaining *288] forty days, might obtain only one day's or one *hour's service. *Kingsmill v. Bull*, 9 East, 185, shows the unwillingness of the courts to sanction such a claim as this, and the passages relied on in Co. Lit. do not apply to cases where a party holds undivided shares in eodem jure, but only where they come to him by different titles. It is true, that according to the distinction between heriot service and heriot custom, if a tenement be holden by an entire service, as a hawk, &c., and the lord purchases a part, the heriot is extinct, though it is otherwise if the tenement be holden by heriot custom, (Co. Cop. s. 24;) but to render this distinction available to the plaintiff, the custom ought to have been expressly found according to his claim; instead of which the jury only find a custom to seize, generally, and it appears from the rental that no more than two heriots have been seized in respect of this property.

Taddy, Serjt., in reply. It may be admitted that heriots were originally magis de gratiâ quàm de jure, and so was also the estate of the copyholder, but in process of time both became ex debito, and fixed by law. (Co. Cop. s. 24.) It is clear from *Talbot's case* and *Bruerton's case*, that where estates are holden by heriot custom, the heriots must be multiplied upon a severance of the estate; quæ in partes dividi nequeunt solida singulis præstantur; but this multiplication is a result of law, not of custom, because the heriot cannot be apportioned, (stat. of Marlbr. 52 H. 3, c. 9;) the finding of the jury, therefore, in the present instance, that the lord was entitled to seize heriots is sufficient to warrant the plaintiff in the number he claims, and it appears from the entries themselves, that seizures have actually been made upon the principle now contended for; as in the instance of Gaell's, Seabrooke's share, and Dagney's; so that the *289] plaintiff's claim does not rest solely on the case of *Attree v. Scutt*, or the case in Fitzherbert, but on the principles of the common law confirmed by statute and practice. Then, although parceners may to some intents have but one estate, it has been shown, that as to others they have separate and distinct freeholds; they must be taken to hold their estates in the way that shall enure most to the benefit of the lord, and according to the terms of their admittance; for it is only in cases of surrender that the tenant comes in according to his title, rather than according to the terms of the admittance, because in surrenders the lord has notice of what the title is: *Brown's case*, 4 Rep. 22 b. All the cases cited as to the tenant's coming in according to his title, are cases of surrender. The separate admissions too, amount to a kind of partition, for coparceners may effect partition by parol, or in any other way, Lit. s. 243. 250. The lord has treated these estates as several, and by so doing, has lost the advantages he might have obtained if they had continued joint; as by seizing the whole for waste committed by one of the joint tenants, 2 Inst. 302, and the admissions, if pleaded, must be pleaded as separate grants.

BEST, C. J. This case of *Garland v. Jekyll* is an action of assumpsit for money had and received, which was tried at the sittings after Hilary term, 1822,

before Lord C. J. DALLAS, in which a verdict was found for the plaintiff, the damages to be ascertained subject to the opinion of the court on a case in which it is stated, "that in the manor of Weeks Park Hall, in the county of Essex, there are, and from time immemorial have been, divers customary and heriotable copyhold tenements of inheritance held by the respective tenants thereof, unto them and their heirs and assigns, by the rod and by copy of the court rolls of the said manor, of the *lord of the said manor for the time being, at the will of the lord, according to the custom of the manor;" then the [*290 case states, that "there is, and from time immemorial has been, a custom within the said manor for the lord of the said manor for the time being, upon the death of every copyhold tenant of any customary and heriotable tenement within the said manor, to have, take, and seize for heriots in respect thereof so many of the beasts which were of such customary and heriotable copyhold tenant at the time of his death, as the number of heriots due in respect of such customary and heriotable copyhold tenements did at that time amount to;" then it is stated, that "it was the custom for the lord of the manor to take and seize for such heriots the best beasts of such tenant, or such as the lord of the manor shall elect to take and seize as the best beasts." The case states, that in the year 1735, Samuel Warner was a copyhold tenant of two customary and heriotable copyhold tenements. Then the case sets out the pedigree of Samuel Warner; it appears that he died seised of these two tenements; that he had four daughters, Catherine, Eleanor, Mary, and Ann; that Catherine, his eldest daughter, had a daughter named Kitty. It appears by the pedigree, that, with respect to the sisters, all the daughters died without issue except Catherine; and it appears that these sisters each took a fourth of the copyhold premises; it appears by the case that these fourths have descended to the four children of Catherine, the eldest daughter, and of the four children two died without issue; the whole of the property is now vested in Sir Charles Bunbury, who claims under Eleanor, and a gentleman of the name of Erasmus Warren, who claims under Kitty; they took the whole of the shares from the four sisters; it then appears that these sisters died at different times, and that their shares vested at different *times. It is not necessary to advert to all the other circum- [*291 stances, but there is one circumstance which I must mention; it is, that Eleanor devised her fourth to Ann; that Ann died without issue; consequently after the death of Ann the share of Eleanor passed on to her nieces, and Erasmus Warren and Sir Charles Bunbury were possessed equally of that fourth. I advert to this circumstance because, with respect to all the other parts of this property, it appears that they have descended regularly, without any break in the descent, from Samuel Warner to Sir Charles Bunbury: with respect to all, except the part which is given by Eleanor to Ann, Sir Charles was a coparcener, holding in coparcenary with Erasmus Warren by regular descent; that is what distinguishes this from the case of *Attree v. Scutt*, to which I will presently advert. It appears that they held equally in coparcenary; but though they held in coparcenary, the property was severed by the will of Eleanor, and they were coparceners, taking under tenants in common, as to this part of the estate; they were coparceners of all the others in regular descent; therefore, if the case of *Attree v. Scutt* be good law, it is quite clear that the lord of the manor, on the death of Sir Charles Bunbury, would be entitled at least to four heriots; but if it is not good law, and it is the opinion of the court it is not, then, on the reunion of the estates, only two heriots are due. The court are of opinion that only two are due; and that though during the period that these estates were held by different persons, different heriots were payable by each, yet when they are united, only one heriot for each estate is payable. It appears that there are two estates, one containing nine acres and the other ten; for these two estates two heriots were payable in Samuel Warner's time, and two are payable at present. I have stated that there is a decision of the Court

*292] of King's Bench in opposition to *the opinion we have formed. Undoubtedly we entertain great respect for any decision of the Court of King's Bench, particularly when such a person as Lord ELLENBOROUGH presided, and when the bench was filled by the learned judges who sat at the time the case of *Attree v. Scutt* was decided, but it has been our duty to examine the grounds on which that decision was given, and after a mature and an attentive consideration of those grounds, we are satisfied that court was misled by a case to which I shall call the attention of the court, that is, the case in Fitzherbert's Abridgment; and as it appears the decision in the Court of King's Bench was founded on the authority of the case in Fitzherbert; if that case ought to have no weight, then little attention is due to the decision founded on such authority. It will be necessary in the consideration of this case to see how copyhold tenures arose in this country. They appear to have grown out of a state of pure villenage: there is no doubt that in the early periods of our history, not only the estate but the personal property of the villein belonged to the lord: it is said, indeed, in Bracton, and the book called Fleta, that heriots are *ex gratiâ*: but it is difficult to conceive how the doctrine of *ex gratiâ* could be applied to the time I am speaking of: the villein was only giving to the lord that which he might at any time take; for his estate was held not only at the will of the lord, but the personal property of the villein was the property of the lord. It is probable,—though this is mere conjecture, for the history of heriots is so obscure that it is impossible to ascertain how they originated,—it is probable that heriots were originally nothing more than the gift which, in a rude state of society, a person in an inferior situation of life, on approaching one of a superior situation, always offered. We know, that in many countries where knowledge and civilization have not made the progress they

*293] *have in this happy country, an inferior person cannot approach a superior without the offer of a present: it has occurred to us, that heriots were a species of tribute the tenant offered to the lord at the time he approached him, in order to secure his protection, and to pray of the lord to confer on him the interest which had been determined by the decease of his former tenant. Mr. Justice BLACKSTONE indeed traces the right of a lord to his heriot to a more advanced period of society: but though he does not use the word tribute, he uses the word donation. He says, 2 Bl. Com. 423, "This payment was originally a voluntary donation or gratuitous legacy of the tenant, perhaps in acknowledgment of his having been raised a degree above villenage, when all his goods and chattels were quite at the mercy of the lord." But whatever the situation of copyholders might have been in the early part of our history, custom has now confirmed their interest as tenants, and this same custom has confirmed and established the rights of the lord. This alteration has been brought about by no statute; the statutes to which we refer with so much satisfaction have only secured the rights of men already free. It is to lawyers in Westminster hall, and I speak it with pride, that slaves, for such was the state of men in pure villenage, are indebted for the permanency of their property, and for that weight in society which permanency in property has conferred upon them; it is by the establishment of the customs referable to copyholds as established in courts of justice, that this permanent interest has placed copyholders in the happy situation in which they are now found;—the copyholder now has a permanent interest in his estate as long as he performs his services, and the lord has certain rights and dues; and as long as the copyholder performs his

*294] *services and pays the dues, he has the same permanent interest in his estate as if it were freehold. I have stated that the heriot was a species of tribute which the heir paid on the death of his ancestor; it was the heir alone who rendered it; he gave but one tribute, one beast, which would probably be his best beast. What was the condition on which the permanent grant was made to him? It was, that he should tender to the lord one beast or one

chattel. It may be asked, if the property was separated into different tenements, was the lord to wait till the death of all the tenants for one heriot? No. Of necessity, the instant the estate became separate there were separate heirs, and each heir paid his tribute: while the estate continued in severalty, in order that the lord might not lose his right, each person having a separate interest had to pay a separate tribute; without this in the division of the property the lord would have lost his rights: services which were capable of severance were considered differently, but these being incapable of severance, while the estate was held in severalty, from the necessity of the thing, were multiplied, but the moment the reunion took place the necessity ceased, and the lord was placed in the same situation as when the grant was first made, that is, he was only entitled to one heriot. Looking to the principle and plain common sense of the thing, and that which is due to justice, it seems to be clear, that since the reunion of the property the right of the lord to those heriots which he had while the estate was separate, ceased, and that only one heriot was due. I would make another observation, which is confirmed by Mr. Justice BLACKSTONE and every one who has written upon the subject, that the rule as to copyholds is this, that the fines and other claims of the lord are not to be carried to such an extent as would work the disherison of the copyholder. It will be found when we come to *con- [295
sider this case, that if this multiplication of heriot services and fees was
to take place, it would work a disherison of the estate; it would make his estate
what the civilians call *damnosa hereditas*;—here are but nineteen acres in all,
and the heriots claimed are nearly to the amount of as many hundred pounds.
It therefore may be fairly stated, that in this particular case, if the lord's claim
can be supported, it will operate to the disherison of the heir. Now is that
fit? We know there is another case in which a court of Westminster-hall has
limited the right of the lord, because if he had a right to claim as much as he
pleased, such claim would have worked a disherison. We know, that formerly
copyholds were held with fines uncertain; but the court have said to the lord,
“you shall not take what you please; it shall be limited; you shall only be
entitled to two year's purchase, because if you take just as much as will
satisfy your cupidity, you may compel the heir to surrender the estate into
your hands; therefore, we will impose our restraint on you.” Upon the same
principle we must restrain the claim of heriots, that these, and the fines and
fees due to the steward, may not exceed the value of the property; therefore,
consistently with the principle, it seems to me impossible that the right of the
lord can be carried to the extent contended for, and that neither justice nor law
give the lord more than was originally due to him as the condition of his grant.
There is very little authority to be found on this subject; there is one case, or,
I should rather say, an opinion entitled to great respect, considering the person
by whom it was pronounced, which was referred to by me in my argument in
the case of *Attree v. Scutt*; I mean the opinion of Lord COKE, Co. Cop. s.
56, “If two several copyholders join in a grant of their copyhold by one copy,
or if one *copyholder having several copyholds, granteth them by one
copy, yet the grantee shall pay several fines, for they shall enure as sever- [296
al grants.” Now, that is like this case. Samuel Warner had two copyholds,
and if he had made a grant the lord would have been entitled to two fines; the
words in the next paragraph are, “but if two joint tenants, two tenants in com-
mon, or tenant for life, and he in the remainder join in the grant of a copyhold,
one fine only is due, and it shall enure as one grant only; so if a surrender be
made, and after a common recovery is had, by plaint in the nature of a writ of
entry en le post, for the better assurance, one fine only shall be paid.” Now
it appears to me that this is directly in point, and if Lord COKE's opinion is
right, that where two tenants in common convey their interest, only one fine
shall be paid, must not the estate be considered as united for ever after? If
there is no more than one fine paid, upon what pretence can there be said to be

more than one heriot due? If this opinion of Lord COKE is warranted by law, it appears to me to be a decisive authority in favour of the judgment we shall pronounce; but I know it has been said, that Lord COKE in this case must be mistaken, for in the margin is a reference to Lord COKE's Reports, 4 Rep. 27 b, and upon referring to the page you find nothing to warrant his opinion. I have looked into the report, and the observation is correct, but it will be found that the same observation will apply to cases that are relied on on the other side; it appears to me that the reference was not made by Lord COKE, but that it has been introduced by some ignorant editor who fancied something confirmatory of the opinion in 4 COKE. The fact is, Lord COKE had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in *Westminster-hall, if what Lord COKE says without authority is not law.

*297] He was one of the most eminent lawyers that ever presided as a judge in any court of justice, and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense. Opposed to this, as I have stated, is the case of *Attree v. Scutt*. I shall read the judgment given in that case, because I think I can answer every part of the reasons and authority on which it was decided. It was an action brought by the steward of a manor for fees, and though the copyhold tenement was but small, it appears the steward was not content with 64*l.*, which was paid into court, but demanded a large sum, I think, more than the value of the estate. I wonder the learned judges did not pause at this circumstance, and consider whether it was possible that a custom for a steward to make such a claim could be good in point of law. In that case the court considered the right of the steward as standing on the same foundation as the rights of the lord. "The question," says Lord ELLENBOROUGH, "in this case, as stated by the plaintiff's counsel, simply amounts to this, whether if two persons hold a copyhold as tenants in common, and the one surrender his moiety to the other, and the other be admitted, he shall hold the land, in respect to the lord and the steward, for the purpose of fines and fees on admittance as *one* tenement or as *two*." Then he goes to a part to which I beg particular attention. "It has been settled so long ago as the time of Ed. 3, that if my tenant who holds of me by a heriot, alien parcel of the land to another, each of them is chargeable to me with a heriot, for it is entire; and if the tenant purchase the land again, yet if I were seized of the heriot by another man, I shall have of him, the tenant, *for each portion* a heriot. This doctrine is to be found in Fitz. Abr. tit. *Heriot*, pl. 1." It is quite clear, that "the noble and learned judge

*298] did not look at the case to which Fitzherbert refers for his authority; if he had, he would have found that there was no such case. He proceeds; "and from thence it follows, that if an estate holden by indivisible services be divided and holden in severalty, and afterwards by the act of the parties shall come again into one hand, the services which were multiplied shall continue to be payable, not as for one tenement, but *for each portion* respectively, i. e., as for distinct tenements, and that they do not again become in respect of the lord one tenement." His lordship says, "the defendant's counsel did not in his argument insist that this might not be so, (if I did not, I did not do my duty on that occasion,) where parcel of a tenement had been aliened and holden *in severalty*; but insisted, that this case differed, as it is the case of an *entire tenement*, having been for some time holden by several persons *in common* and not *in severalty*, and afterwards coming into one hand by a conveyance to one of such tenants of the interests of the rest, contending that a conveyance by a number of tenants in common is not the conveyance of distinct estates, but of one estate; but to this we do not assent. Tenants in common are they who have lands by several titles, each having a several freehold, but with an undivided occupation; and every one of them shall do several services, and several suits; and one of them may enfeoff the other, for there is no privity between

them." Here his lordship refers to a passage in Brooke's Abridgment, in order to show that one tenant may enfeoff another; then he refers to the case of *Fisher v. Wigg*, where, as he says, "one of the objections of Lord Holt to construing a surrender of a copyhold to A., B., and C., equally to be divided between them, as creating a tenancy in common, was according to the report in P. Wms. 21, 'that by such construction, instead of one copyhold estate, and *one fine and single service, there would be five several copyhold estates, and as many fines and services.'" There is no doubt that is the case as long as they continue in common; but I am surprised it did not occur to his lordship that the argument of Lord Holt cannot be pressed further; there is nothing in any book or in any modern treatise, that goes the length of showing, that when the estates are again united, the heriots continue to be paid. Then his lordship adds, "As to the authority from Lord Coke's Copyholder, sect. 56," "we think there must be some mistake in the printing; the page referred to in 4 Coke, 27 b, being silent as to any such subject." I have already made the observations that occurred to me on that subject. Then he says, that "though the law is certainly as there laid down as to joint tenants and tenant for life and remainder man, yet it may be well doubted as to tenants in common who have several estates;" and then he mentions that "in Plowd. 140, it is laid down, that if two tenants in common grant a rent of 20s. it shall enure as several grants." Undoubtedly that is the law; it is the grant of several persons; though what Plowden says is no authority; nor is it in this case the opinion of any judge, but it is only the argument of Serjt. *Catline*. Unquestionably it does enure as several grants, for it is an interest that passes from two people; but though it does, does it follow that when the grant has produced its effect by conveying the estate to one person that there should still continue to be several heriots? It is a non sequitur into which this noble person has fallen. I can find nothing to support this doctrine—nothing whatever but the passage in Fitzherbert; for, giving the fullest effect to Plowden, and considering it to be the dictum of a judge instead of the argument of a serjeant, the question is, what is the effect of the reunion which the conveyance occasions? Now let us see whether there is any *deference due to the authority of the case in Fitzherbert. To avoid any mistake, I have copied it in the Norman French, which I translate thus: "If my tenant who holds from me, aliene parcels of his land to others, every one of them will owe to me an heriot, because the heriot is entire; and if the same tenant purchases back again, I shall have two heriots from him." And Fitzherbert says that was the opinion of WYL. and SHARD.; Fitzherbert does not mean to refer to the year-books, as Lord ELLENBOROUGH supposes, for when he does, he not only mentions the term and the year of the reign, as "Hilary 43 Edw. 3:" but he puts a figure to denote the number of the case in the year-book. Here, there is no figure. It is certainly not in the year-books which have come down to us, for looking at the year-books of Edward 3, they stop at the 30 Edw. 3, and they do not begin again till the 38th; so that there is no year-book for the 34 Edw. 3. It may be said that Fitzherbert was possessed of an edition which is not accessible to us: that is possible; but we have looked at the *liber Assizarum*, and there is no case similar to this. The next thing I have to advert to destroys the case altogether; it is, that there were no judges living in the 34 Edw. 3, whose names answer to Wyl. and Shard. The only judges I can find,—and I have looked into Dugdale, who has given us a list of the judges of the Court of Common Pleas, though not of the judges of the other courts.—The only two judges I can find who would answer the description of Wyl. and Shard., are Richard De Wylughby and John De Sharden; both these were dead by the 24 Edw. 3. I find by the *Chronica* series that there was a John De Wild, who was chief baron of the Exchequer in 34 Edw. 3. If he was, he never could have sat in any court of Westminster-hall with John De Sharden, a

*301] judge of the Common Pleas, for the Exchequer Chamber, in which *the Common Pleas and Exchequer judges meet, did not then exist. It is clear, therefore, that there is some great mistake as to that case. It was a loose note, probably the decision of a judge at Nisi Prius. It will not be found in any one book of authority, for if it had, we should have found it in Brooke, Rolle's Abridgment, Viner or Comyns. We find it in none of these; but it is to be found in Kitchin on Courts, 269, and in a way that shows it was greatly mistaken by Fitzherbert. Let us see how it appears there;—he refers to Fitzherbert, he thought it was not an authority, and he stopped short at the point at which we stop: he makes the tenants in common, while they continue in common, pay several heriots, but he goes no further. His words are, "If my tenant, which holds of me by a heriot, aliens parcel of his land to another, every one of them shall pay heriot for that, that it is entire;" there the passage stops; there is not a word implying, that if they are again united they shall pay more than one heriot; he refers to Fitzherbert only, and not to the year-book. Now, to the doctrine of Kitchin we subscribe, that where they remain in severalty, they must for that reason pay several heriots, but the case goes no further—it goes as far as common sense and law, and then stops. Fitzherbert's Abridgment is the compilation of a learned judge, but even learned judges may sometimes make mistakes. And the authority on which the case of *Attree v. Scutt* depends, has crept into Fitzherbert, and is not supported by any other authority. Undoubtedly, every respect is due to an ancient decision, when from time to time it has been acted upon. *Vires acquirit eundo*: by passing down a series of years, and being from time to time recognised by every writer, ancient decisions acquire a degree of authority which does not belong to modern decisions;—*not for being more consonant with justice, but

*302] that they have the sanction of time;—but no such authority belongs to this case, for this case is quoted but once during all the period of time since Fitzherbert, and that quotation destroys its authority, and is not confirmed by the authority of any learned author who has since written on the law. Instead, therefore, of being an ancient case entitled to weight, it is entitled to none at all; the authority of it is destroyed; and it is impossible but that the diligent professors of the law who have written on the subject, would have admitted it, or that it should have been quoted by Kitchin as he has quoted it, if up to the extent of Fitzherbert, it had been entitled to be considered as any authority. We must apply the contrary of the rule; we must say that the remoteness of the case, instead of strengthening, weakens its authority. I have stated, that the books furnish us with no other authorities to guide us, and unless we are compelled by authority to say that this is law, I for one will never say so; for, instead of doing what has been done by our predecessors, namely, giving stability to this species of interest, and doing that which would confer a benefit by raising a class of people from slavery to independence and opulence, and consequently to respectability and power.—Instead of giving stability to the interest and enlarging the rights of the copyholders,—we should be establishing a rule which would destroy their estates. Unless compelled by authority I will not do that. After the greatest diligence in our researches, we can find no other authority to warrant the doctrine in the case of *Attree v. Scutt*, but the one to which I have referred. If we had not discovered that *Attree v. Scutt* stood on a false foundation, we should have been much embarrassed by it. We see the only ground on which the case of *Attree v. Scutt* rests, and we find it cannot be supported.

*303] We find, that if the learned judges had *endeavoured to trace the case in Fitzherbert to its source, they would have seen it had no solid foundation. There is nothing on which it can stand, and therefore we have no difficulty in deciding against it. This has been argued as a question of general copyhold law: if the jury had found that there was a custom of this kind within

this manor, and it had been put to us to say whether the custom was good or not, perhaps we might have been of a different opinion. It is not necessary to say what our opinion would have been. There is no custom found, that on a reunion the multiplied heriots are to be paid. It has been discussed as a question of law, and we are to say, whether, without any custom being found, it is the necessary legal consequence, that when an estate has been divided and again reunited all the heriots are to be paid, after the reunion of the several estates, that were paid whilst it was divided; we say there is no such law, no such doctrine. Our judgment therefore, is, that two heriots only are payable, notwithstanding the tenancy in common that has intervened in the passage of this property down to Sir Charles Bunbury, and we are of opinion that only two heriots were payable on the death of Sir Charles Bunbury.

PARK, J. The verdict must be entered for the value of the two first heriots, 158*l.* 11*s.*, and the judgment accordingly.

*AARONS v. WILLIAMS, SEARLE, and CANN. [304]

If one of many defendants who have severed in defence, sues out a writ of error, the plaintiff cannot proceed to execution, because one of the other defendants makes an admission that the writ was sued out for delay.

THE defendants, who were bankers, were sued in this action on their acceptance of a bill of exchange. Williams and Searle appeared jointly and pleaded a judgment recovered; Cann employed a separate attorney, appeared separately, and demurred to the declaration; upon which demurrer and an issue of nul tiel record, judgment was obtained in Easter term last. A writ of error was thereupon sued out on behalf of Cann, allowed by the officer of the court, and notice of the allowance served on the attorney for the plaintiff: Searle afterwards admitted that the writ of error was sued out for delay, and the plaintiff's attorney thereupon issued a ca. sa. against all the defendants: no admission of delay having been made by Cann, or her attorney,

Bosanquet, Serjt., obtained a rule nisi to set aside the writ, and subsequent proceedings, with costs.

Vaughan, Serjt., (and *Onslow* and *Wilke*, Serjts., were for the other defendants,) who showed cause, cited *Ellis and Others v. Sweet*, (a) K. B. Easter term, 1824, in which a writ of error having been brought by one of many plaintiffs, and another of them having admitted it was for delay, the court required an affidavit that there was real error.

BEST, C. J. The case we have been referred to does not bear on the present, and if it did, it is a question *whether or no we should adopt it; but the case is distinguishable, because it was an action by many joint plaintiffs; whereas the defendants in this action have severed; one of them has purchased his writ of error, which is a writ of right; and though the courts have interfered, where the party making the admission of delay was the party who sued out the writ, they will not interfere in other cases. [305]

PARK, J. We do not run counter to the rule which has been laid down in several late cases, but *Ellis v. Sweet* has no bearing on the present, and it goes to establish a practice of which I cannot approve, namely, the calling for affidavits to support a writ of right. I shall feel a difficulty in acquiescing with this, unless the legislature interfere.

BURROUGH and GASELER, Justices, concurring, the rule was made

Absolute

(a) Not yet reported.

*306] *PERHAM v. RAYNAL, FORSEY, and MILVERTON

An acknowledgment within six years by one of the joint makers of a promissory note will revive the debt against the other, although he has made no acknowledgment, and only signed the note as a surety.

ACTION against the defendants as the joint makers of a promissory note. Plea, statute of limitations. Replication, taking issue thereon.

At the trial before *Bosanquet*, Serjt., Somerset Lent Assizes, 1824, it appeared that Milverton was only a surety and had made no acknowledgment of the debt within six years, but an acknowledgment by one of the other defendants within that time having been proved, the learned Serjt. directed the jury that the acknowledgment of the joint debt by any one of the defendants would be binding on the others, and a verdict was taken for the plaintiff, with liberty for the defendants to move to set it aside, and enter a nonsuit. Accordingly *Pell*, Serjt., on behalf of the defendant, having obtained a rule nisi to that effect,

Wilde, Serjt., who showed cause, relied on *Whitcomb v. Whiting*, Doug. 652; *Jackson v. Fairbank*, 2 H. Bl. 340, and *Brandram v. Wharton*, 1 B. & A. 463, as authorities to show that an admission or acknowledgment by one of many joint defendants, is binding on the others; and urged that the admission of one partner would bind all in respect of their joint interest. He distinguished *Atkins v. Tredgold*, 2 B. & C. 23, on the ground that the acknowledgment there was not made by a person jointly liable.

Pell, in support of his rule, distinguished the present from those cases, on the *307] ground that the defendant Milverton was only a surety, and had, therefore, a right to expect notice if the note was not paid. He urged that the authority of *Whitcomb v. Whiting* had been much shaken by what fell from the judge in *Atkins v. Tredgold*, and that *Bland v. Haselrig*, 2 Vent. 151, was an authority the other way. He also cited *Rooth v. Quin*, 7 Price, 193, where in an action against other partners, on a bill accepted by a co-partner in the name of the firm, the admissions in his answer filed to a bill in equity against him were holden not admissible in evidence against the rest.

BEST, C. J. The question for us, in this case, is, whether where there are three defendants, and a debt due from them is more than of six years' standing, a promise by one of them will prevent the operation of the statute of limitations? The court is of opinion that it will. The question is one of considerable importance, and the doubt has been raised by certain expressions which have fallen from some of the judges, impugning the authority of *Whitcomb v. Whiting*. The words of the statute are exceedingly strong, "All actions of trespass, detainue, &c., shall be commenced and sued within the time and limitation hereafter expressed and not after." Looking at these words one might be led to conclude, that in no instance could a remedy for debt be had after six years; but that construction cannot be adopted, because if it were, a party might elude paying the principal, although he had paid interest for six years: and it was decided by all the judges in *Heylin v. Hastings*, Carth. 471, that after ten years a bare acknowledgment was sufficient to revive the debt. The principle of that

*308] decision is, that the statute ought only to operate when, from the circumstance of non-claim for six years, it may be presumed, either that the cause of action never existed, or that it has been satisfied: but there are many cases, in which, although a cause of action may never have existed, or may have been satisfied, it would be difficult to answer it if brought forward at the distance of six years after the time of the alleged contract. The presumption certainly is, that the debt, if any, has been paid. But that presumption may be rebutted, and is rebutted, by a subsequent acknowledgment. From the decision of *Heylin v. Hastings* down to the present time, it has always been holden that a new promise revives the old debt, but does not create a new one. It has been argued, that there is a distinction where there are many defendants,

and only one of them makes an acknowledgment ; but there is no ground for this distinction, for a party who makes the acknowledgment cannot deny the existence of the debt, and if the acknowledgment of one, where only one is sued, will prevent the operation of the statute of limitations, so also will the acknowledgment of one where three are sued. If we were to decide otherwise we should establish an anomaly in the law, because in other cases an acknowledgment by one of many who are jointly concerned is binding on the others. This distinctly appears from *Vicary's case*, Gilbert's Evidence, 51. Lord ELLENBOROUGH has applied the same principle in cases of trespass, and he says, in *The King v. The Inhabitants of Hardwick*, 11 East, 578, "Evidence of an admission made by one of several defendants in trespass, will not it is true establish the others to be co-trespassers ; but if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against *all who are proved to have combined together for the common object." In [309 the same case *LE BLANC, J.*, extended the application of the principle to evidence adducible in settlement-cases, and the legislature afterwards acted upon his opinion. The same doctrine has been applied to acknowledgments in cases of conspiracy and other offences up to high treason. What then is there to distinguish cases under the statute of limitations from others ? But the point has been expressly decided in *Whitcomb v. Whiting*. In that case it was holden, that the admission of one of several drawers of a joint and several promissory note took it out of the statute of limitations as against the others, and might be given in evidence on a separate action against any of the others. And the language of the judge is, "Payment by one is payment for all, the one acting virtually as agent for the rest ; and in the same manner, an admission by one is an admission by all ; and the law raises the promise to pay, when the debt is admitted to be due." It has been supposed that this case is not law. However, I should be slow to decide that any thing which fell from Lord MANSFIELD is not law ; he had all the acquirements requisite to form a great lawyer, and knew human nature in all its branches. *Bland v. Haselrig* has been relied on as an authority the other way ; but it ought not to have weight, for one of the judges differed, and other circumstances show it to be a case of no authority. The verdict was, that one of the defendants did assume within six years, and that the others did not ; and it was held that the plaintiff could not have judgment against that defendant who was found to have promised within the six years ; but as is well observed of this case by Lord GLENBERVIE, who is now authority, in a note to his report of *Whitecomb v. Whiting*, it "may be explained on the manner of the finding ; for as the plea was *joint*, and the replication *must have alleged a *joint undertaking*, the verdict did not find what the plaintiff had bound himself to prove." [310 POLLEXFEN, C. J., and POWELL and ROKEBY, Js., were of opinion that the plaintiff could not have judgment. VENTRIS inclined to the contrary. He considered it as a promise, which the case in Carthew shows it was not. But the chief justice seemed of opinion, "If the promise were renewed within the six years, yet if not upon a new consideration, it should not bind, and if there were a new consideration, the action will lie against him that promised alone." "Sed quære, for the common practice is, upon a plea of the statute of limitations, to prove only a renewing the promise without any further consideration ; but a bare owning the debt is not taken to be sufficient." That case cannot be considered law at present ; and with deference to POLLEXFEN, a moral obligation to pay the debt was a sufficient consideration for the promise. The decision, therefore, was erroneous, except that the verdict found precluded any other judgment. The other case which has been referred to, is *Rooth v. Quin*, and in that the judges certainly said, "that it was a rule in equity not to receive the answer of one party against another."

No reason is given for this position ; but the reason is, that the evidence proposed was *res inter alios gesta*, and the decision was clearly right. In *Atkins v. Tredgold*, two of the judges have thrown out dicta, impugning the authority of *Whitcomb v. Whiting*, but the expressions are only dicta, and the two other judges abstain from saying any thing to the same effect. That case was assumpsit against the executors of John Tredgold, deceased, on three promissory notes made by the testator jointly and severally with Robert Tredgold, and payable on demand to John Atkins, deceased. R. T. was one of the executors of J. T., and ten years after J. T.'s death, paid interest upon the notes.

*311] At the trial, the jury found that he paid such *interest in his character of maker of the note, and not in that of executor. The question was, whether such payment of interest took the case out of the statute of limitations, so as to render J. T.'s executors liable ; and all that the court decided was, that payment by one maker, after the joint contract had determined by the death of the other, did not take the case out of the statute of limitations, so as to make the executors of the deceased maker liable, which does not affect the present case. But it is material to look to p. 25, where it appears, that ABBOTT, C. J., told the jury, " If they thought that the payments made by Robert Tredgold were made by him in his character of executor, they should find for the plaintiffs upon those counts. If, however, they thought the payments were made by him on his own account, as the joint maker of the notes, then they were to find for the defendants." So that at that time he thought the doctrine in *Whitcomb v. Whiting* correct, because he charged the jury in conformity therewith. These are all the cases and dicta that seem to oppose that decision, and with these exceptions it has always been acted upon and upheld.

In *Perry v. Jackson*, 4 T. R. 516, Lord KENYON says, " It is admitted, that one partner may do several acts to bind the interests of all ; he may release as well as create a debt ; he may, also, by his acknowledgments take a case out of the statute of limitations."

In *Jackson v. Fairbank* it was holden, that payment within six years by the assignees of one of two drawers of a joint and several promissory note, who had become bankrupt, of a dividend on account of the note, was sufficient to prevent the other drawer from availing himself of the statute of limitations, in an action brought against him for the remainder of the money due on the *312] *note. That goes farther than *Whitcomb v. Whiting*, and it came under consideration in *Brandram v. Wharton*, where Lord ELLENBOROUGH, speaking of *Whitcomb v. Whiting*, says, " By that decision, where, however, there was an express acknowledgment by the actual payment of a part of the debt by one of the parties liable, I am bound." So that he admits the authority of *Whitcomb v. Whiting*, of which BAYLEY, J., also seems to express approbation. It seems, therefore, that the decision in *Whitcomb v. Whiting* rests on the same principle as decisions with respect to admissions by one of several persons jointly concerned in other instances ; that we should create an anomaly by departing from it ; that it has been confirmed in many cases, and not shaken by any authority ; and that therefore our judgment, at present, must be, to discharge the defendant's rule.

Rule discharged accordingly.

GASELEE, J., did not hear the argument, and, therefore, bore no part in the judgment

END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

IN THE FIFTH YEAR OF THE REIGN OF GEORGE IV.

*TATTON, Demandant; GREY, Vouchee.

[*313]

Where the dedimus described the vouchee as a commoner, and the acknowledgment was signed as if by a peer, the court refused to allow the tenant's appearance to be recorded.

THE vouchee, who was the son of a peer, was described in the dedimus as George Harry Grey, Esq., but he had signed the acknowledgment "Grey."

Cross, Serjt., upon an affidavit by the commissioner that the person signing himself "Grey" was the person described in the dedimus as George Harry Grey, Esq., moved that the tenant's appearance might be recorded and that the recovery might pass, the vouchee being out of the country.

*The Court objected, that as the dedimus described a commoner, and the signature to the acknowledgment appeared to be that of a peer, it might at some future period be supposed the dedimus did not give any authority for the acknowledgment; to which

[*314]

Cross answered, that the commissioner's affidavit being filed of record, would always prove the identity of the party; that no way was prescribed by law in which a party should sign his name; that a mark was, in many cases, sufficient, and the mere initials of the christian name preceding the surname could not have been objected to in the present case.

The Court said, that in the exercise of their discretion they could not grant the application.

The next day, however, observing on the inconvenience that would be occasioned to the vouchee, they said they would allow the tenant's appearance to be recorded, *Cross*, Serjt., keeping the papers in his hands till the vouchee should return from abroad, and the acknowledgment be taken anew.

DE WÜTZ v. HENDRICKS.

The plaintiff sued in trover to recover damages for the detention of papers which he had depo-

sited with the defendant in furtherance of a fraudulent purpose, and the jury having found a verdict for the defendant, the court refused to grant a new trial. It is illegal to raise loans for subjects in arms against a government in amity with the government of this country.

THE plaintiff had proposed to raise a loan for the Greeks in arms against the government of the Porte. For this purpose he lodged with the defendant, *a stockbroker, an instrument which was alleged to be a power of attorney, signed abroad by the Exarch of Ravenna, but which turned out to have been fabricated in London; and the defendant, at his request, procured to be engraved certain scrip receipts, bearing a stamp. Suspicions having arisen as to the accuracy of the plaintiff's representations, the project for a loan failed, and the defendant refused to return to the plaintiff these papers, except upon receiving commission for scrip; which commission the plaintiff offered to pay, provided the defendant would transfer to the plaintiff the scrip on which he claimed commission. No scrip, however, had ever been raised.

THE plaintiff having in vain offered to comply with all other demands made by the defendant, sued in trover for the papers specified above, when the jury (at the trial before BEST, C. J., London sittings after Trinity term last) being led to believe that the whole transaction was a fraud on the part of the plaintiff, found a verdict for the defendant.

Pell, Serjt., now moved for a new trial, on the ground that the circumstance of the plaintiff having been engaged in a fraudulent transaction (admitting such to have been the case) did not deprive him of property in his own papers. If, instead of papers, he had deposited a box of jewels with the defendant, could it be contended that the defendant would have any right to retain them on this pretence: the principle was the same with respect to the papers, however small their value; but in truth they were of some value, inasmuch as an allowance would have been made at the stamp-office for the useless stamps.

BEST, C. J. It occurred to me at the trial that it was contrary to the law of nations (which in all cases of international law is adopted into the municipal code *of every civilized country,) for persons in England to enter into *316] engagements to raise money to support the subjects of a government in amity with our own, in hostilities against their government, and that no right of action could arise out of such a transaction. I stated my opinion to the counsel for the defendant, but he did not ask for a nonsuit, so I permitted the cause to proceed. In consequence of what I said, a note has since been sent me of a case that occurred lately in Chancery, in which the lord chancellor is reported to have said that English courts of justice will afford no assistance to persons who set about to raise loans for subjects of the king of Spain to enable them to prosecute a war against that sovereign. Had I been aware that my opinion was supported by such high authority (although the counsel for the defendant would not take the objection,) I should have nonsuited the plaintiff. On further consideration, I think that my opinion at the trial was right, and on that ground we ought not to grant a new trial. It appeared that placards had been stuck up in the city, stating that the plaintiff was not authorized by the Greek government to raise any money, and that he had been informed that on account of what was stated in these placards no money could be raised for him. The power of attorney, which it was pretended was sent from Greece, was proved to have been manufactured in this country, but by whom it was executed did not appear. I told the jury that, with respect to the power of attorney, there was no evidence that any instrument of that description had ever come to the hands of the defendant; for by power of attorney in the declaration, must be understood an instrument duly executed as a power of attorney. I further said, that if the plaintiff was attempting a fraud on the public by raising money on the false pretence of pledging the Greek government for its repayment, and in furtherance of that attempt delivered these papers to the defendant, he could

*maintain no action to recover them back. The jury, to my entire satisfaction, found for the defendant. [*317]

The rest of the court concurred, and *Pell*

Took nothing.

BARKER v. GREEN.

In an action on the case against the sheriff for not arresting J. W., against whom a writ had issued, it appeared that J. W. was in custody the day after the return of the writ, and that the plaintiff had sustained no damage: *Held*, that the jury were properly directed to consider "whether J. W. could have been arrested before the return of the writ; and if he could, what damage had been sustained by the plaintiff."

CASE against the sheriff of Lancashire, for not arresting J. W. (against whom the plaintiff had issued a bailable writ) between the issuing and return of the writ.

At the trial before HULLOCK, B., at the last Lancaster assizes, it appeared, that if the defendant had not J. W. in custody on or before the return of the writ, at all events he had him the day after, and that the plaintiff had sustained no damage whatever.

The learned baron put it to the jury to consider, whether J. W. could have been arrested before the return of the writ; and if he could, what damage had been sustained by the plaintiff; adding, "I do not see what possible damage."

The jury found a verdict for the plaintiff, damages one farthing.

Cross, Serjt., with a view to the costs, now moved for a rule nisi to set aside this verdict, and enter a nonsuit instead, on the ground that actual damage was the gist of the action, and that the jury ought to have been directed to find a verdict for the defendant if they thought the plaintiff had sustained none.

But the Court held, that if there was a breach of duty the law would presume some damage; and that therefore the direction to the jury was correct.

Rule refused.

*CLOUD v. TURFERY and ABBOTT.

[*318]

The 9 Ann. c. 23, s. 4, inflicts a penalty on any person who shall drive or let to hire any hackney coach or coach horses in the cities of London or Westminster without a license from the commissioners of hackney coaches.

The 1 G. 1, c. 57, s. 1, inflicts a penalty on any person who shall drive for hire in the same cities with any coach whatsoever, hearse or coach horses, except such person be licensed by the commissioners of hackney coaches:

Held, that a conviction was insufficient, which charged the party with driving and letting to hire in the said cities a certain coach and two coach horses, and also with driving to hire a certain coach and two coach horses, and conveying a person in the said coach for hire.

THIS was an action of trespass brought by the plaintiff against the defendants to recover damages for the seizure and detention of a coach and two horses of the plaintiff. The defendants pleaded the general issue, whereupon issue was joined. At the trial of the cause before DALLAS, C. J., at the sittings at Westminster after Michaelmas term, 1820, the jury found a verdict for the plaintiff, damages 12*l.*, subject to the opinion of the court upon the following case.

The plaintiff was the owner of a stage coach duly licensed by the commissioners of stamps to carry passengers between London and Hammersmith: and the defendant, Turfery, was a messenger to the commissioners for licensing and regulating hackney coaches. (a) On *the 21st of April, 1820, the driver [*319] of the plaintiff's coach took up in St. Paul's church-yard, from which

(a) By 9 Ann. c. 23, s. 1, extended by subsequent statutes, the crown is empowered to appoint commissioners for licensing hackney coaches; and by s. 4 it is enacted, "That from and after the 24th day of June, 1715, during the term of two and thirty years from thence next ensuing, no person or persons shall presume to drive or let to hire by the hour or day or otherwise, any hackney coach or coach horses, within the cities of London or Westminster or suburbs of the same, or within the parishes or places comprised within the bills of mortality, without

place the coach sets out in London to proceed towards Hammersmith, one Lindsay, who resided in Queen-street, May-fair, and who had previously, at the coach-office of the plaintiff, booked his place and paid his fare for the whole distance to Kensington. When the coach arrived at Hyde Park corner, Lindsay desired to be set down, and was set down accordingly. He had not previously made known to the driver of the coach his intention of proceeding no further than Hyde Park corner on that day: but he had on former days been set down in like manner, always booking a place and paying the full fare to Kensington. On the following day, the driver in like manner conveyed the same person under precisely the same circumstances. The plaintiff's coachman, who so drove Lindsay, had been previously warned by the commissioners for regulating hackney coaches, that he was acting illegally in conveying Lindsay as well as others from place to place within the paved streets.

*320] On the 17th of June, 1820, the defendant Turfery, under and by vi. tue of two warrants of distress respectively under the hands and seals of the commissioners for licensing and regulating hackney coaches, and bearing date respectively the 16th of June, 1820, seized and levied, as distress for certain penalties under two convictions, a coach and two horses belonging to the plaintiff, and drove them to and left them at the stable-yard of the defendant Abbott, in Drury Lane; where they were detained by Abbott, until the plaintiff, to repossess himself thereof, was obliged to pay to the defendants the amount of the two penalties claimed, viz., 10*l.*, together with 1*l.* 2*s.* as costs of the said warrants of distress. The defendants, under the general issue, gave in evidence, two convictions precisely similar to each other, except that in the first the offence was laid on the 21st of April, 1820; and in the second, it was laid on the 22d of April, 1820.

The following is a copy of the first of the convictions.

"Be it remembered, that on the 12th day of May, in the first year of the reign of our sovereign lord George the Fourth, by the grace, &c., in Essex-street, in the parish of St. Clements Danes, in the county of Middlesex, Sarah Ann Quaife, of Essex-street aforesaid, cometh in her proper person before us, the major part of the commissioners, nominated and appointed by his majesty's commissioners under the great seal of Great Britain, for the licensing and regulating hackney coaches and chairs: and now here giveth us, the said commissioners, to understand, that one George Cloud of Hammersmith, in the county of Middlesex, coach-master, heretofore, to wit, on the 21st day of April, in the year of our Lord, 1820, and in the first year of the reign of his said majesty, the said George Cloud, not then and there being licensed by the commissioners aforesaid, or the major part of them so to do, did *drive and let to hire*, a

*321] certain coach and divers, to wit, two coach horses from St. Paul's church-yard, in the parish of St. Faith, in the city of London, to Piccadilly in the parish of St. George, Hanover Square, in the liberty of the city of Westminster, in the county of Middlesex: the first mentioned place, to wit, St. Paul's church-yard in the parish of St. Faith, then and there being within the bills of mortality, and within and upon the paved streets of London, and the

leave or license first obtained from the said commissioners, upon pain to forfeit for every such offence the sum of five pounds."

By the statute 1 G. 1, c. 57, s. 1, the commissioners for putting in execution the act 9 Ann. c. 23, are empowered to make bye-laws, &c., to bind the keepers, &c., of hackney coaches.

And by the third section of that statute it is enacted, "That from and after the said 24th day of June, no person or persons shall presume to stand, ply, or drive for hire with any coach whatsoever, hearse, or coach horses, or shall let to hire any mourning coach or coach horses to wait or attend on any funeral within the cities of London and Westminster or suburbs of the same, or within the parishes or places comprised within the weekly bills of mortality, except such person or persons who are or shall be licensed by the said commissioners pursuant to the before-mentioned act; that every person so offending shall for every such offence forfeit the sum of five pounds, the said offence to be determined, and the said penalty to be recovered, levied, and applied as in and by the said recited act is directed concerning the penalty for driving an hackney coach for hire without license within the places aforesaid."

said next mentioned place, to wit, Piccadilly, in the parish of St. George, Hanover Square, in the liberty of the city of Westminster, then and there being within the bills of mortality, and within and upon the paved streets of Westminster, contrary to the form of the statutes in such case made and provided : whereupon the said George Cloud being duly summoned to appear before us the said commissioners, in Essex-street, in the county of Middlesex aforesaid, to make his defence against the said charge contained in the said information, appeared before us by one Richard Cloud, his agent in that behalf, on the day and year first above mentioned, and having heard the same, the said Richard Cloud, as such agent as aforesaid, is asked by us the said commissioners, if he can say any thing for or on behalf of the said George Cloud, why the said George Cloud should not be convicted of the premises above charged upon him in form aforesaid ; who pleadeth and saith, that the said George Cloud is not guilty of the premises, and ought not to be convicted thereof, but doth not show to us why the said George Cloud should not be convicted of the offence in the said information above contained against him : and further, at the same time and place, (that is to say,) at Essex-street aforesaid, one credible witness, to wit, John Gibbs of the parish of Lambeth, in the county of Surrey, yeoman, came before us, and in the presence of the said Richard Cloud, who appeared as aforesaid on behalf of the said George Cloud, the said John Gibbs upon *his oath on the Holy Gospel of God to him, then and there by us administered, (we being duly authorized and empowered to administer the [322 said oath,) deposeeth and saith, that a driver of the said coach in the employ of the said George Cloud, on the said 21st day of April, in the year aforesaid, did *drive to hire* a certain *coach* and two *coach horses* from St. Paul's church-yard in the parish of St. Faith aforesaid, in the city of London aforesaid, to Piccadilly in the parish of St. George, Hanover Square, within the liberty of the city of Westminster aforesaid, in the county aforesaid, the same places then and there respectively as aforesaid being within or on the paved streets of London and Westminster as aforesaid ; and that the said John Gibbs then and there saw the driver of the said coach of the said George Cloud take up in the said coach, which he was then and there driving, at St. Paul's church-yard aforesaid, in the parish of St. Faith aforesaid, in the city of London aforesaid, a certain person whose name is as yet unknown ; and that the said driver of the said coach of the said George Cloud, then and there carried and conveyed the said person in the said coach for hire, from St. Paul's church-yard aforesaid, in the parish of St. Faith aforesaid, in the city of London aforesaid, to Piccadilly aforesaid, in the parish of St. George, Hanover Square, in the liberty of the city of Westminster aforesaid, in the said county, and upon hearing and duly examining the whole matters aforesaid, it manifestly appeareth to us, that the said George Cloud is not licensed by us, and that he is guilty of the premises above charged upon him, in and by the information aforesaid ; therefore, the said George Cloud, on the said 12th day of May, in the first year aforesaid, before us the commissioners aforesaid, by the testimony of the said John Gibbs, a credible witness as aforesaid, according to the form of the statutes in such case made and provided, is convicted of the offence aforesaid, and hath forfeited the sum of 5*l.* of lawful money of Great Britain, *to be distributed as [323 the law directs. In witness whereof, we, the said commissioners to this present record of conviction, have set our hands and seals at Essex-street aforesaid, in the county aforesaid, the said 12th day of May, in the said first year of the reign of our said lord the king that now is."

The question for the opinion of the court was,

Whether the plaintiff was entitled to recover : if the court should be of that opinion the verdict was to stand ; but if the court should be of the contrary opinion, a nonsuit was to be entered.

Pell, Serjt., was to have argued for the plaintiff, but the court stopped him, and called on

Vaughan, Serjt., for the defendants. The plaintiff has clearly been guilty of an offence under the 9 Ann. c. 23, s. 4, and 1 G. 1, c. 57, s. 1. By the first of those statutes a monopoly was given to the licensed owners of hackney coaches, within the cities of London and Westminster, upon the considerations of a certain rent, certain regulated fares, and various rules, bye-laws, and penalties to which they were subjected; it would, therefore, be a great injustice if they were exposed to the competition of other coaches. [GASELEE, J. Before you are let in to argue the merits, you must support the conviction. The thing prohibited by 9 Ann. is the driving or letting to hire any hackney coach without being duly licensed; but the conviction nowhere states that the plaintiff drove or let to hire a hackney coach.] Within the spirit of that act, and for the necessary protection of hackney coach owners, any coach must be deemed a hackney coach in which the driver conveys persons from street to street for hire, and this the driver appears to have done in the plaintiff's coach; besides, he is alleged to have let to hire two coach horses, which the act also prohibits: but *324] by 1 G. 1, he is liable *to a penalty if he drives for hire with any coach whatever, unless previously licensed by the hackney coach commissioners. [BURROUGH, J. The information alleges, that the driver of the plaintiff did drive to hire a certain coach, and conveyed a person in the coach for hire, instead of alleging, according to the words of the act, that he drove *for hire with a coach*.] It is clear, from the whole case, that the plaintiff knew he was infringing the rights of the hackney coachmen, and in an action like the present the court will decide on the merits of the case, and not on the technical language of the conviction. The 55 G. 3, c. 185, ss. 11, 12, only allows the drivers of stages to take up passengers in the streets for the places of their ultimate destination.

BEST, C. J. If the conviction is not strictly regular, and our judgment is to go against the plaintiff, a man may be punished who is in law unconvicted of any offence. He may have done that which has rendered him liable to a conviction; but unless that conviction is legally and regularly obtained, execution must not ensue. Now the conviction, to be good, must pursue not only the words but the spirit of the act of parliament. This has not been done in the present instance, either with reference to the statute of Ann. or that of G. 1. The fact is, as it has been stated, that licensed hackney coachmen were allowed to claim a monopoly in respect of certain rents which they paid to government for the same; and the statute of Ann. was passed to prevent others who were not thus licensed from interfering with their business. Clearly, however, the statute was not intended to apply to stage coaches, which in driving along might take up and put down their passengers in the streets. According to the words of the act, the party, to make himself liable, must profess to act as a hackney coachman, which in this case he did not profess, but, on the contrary, is stated *325] to have made a contract perfectly *legal, and which he was bound, if called on, to make. Under this contract he was conveying a passenger to Kensington, but on the road that passenger wished to alight; and I know of no law which gives the coachman the power of forcing him to go on. With respect to the statute of G. 1, there is a fatal variance between the words of the act and the information, in which it is nowhere stated that the plaintiff drove *for hire*. I am, therefore, of opinion, that the conviction cannot be supported on either of these statutes, and that the 55 G. 3, has no reference to the matter at all. The conviction is consequently bad, and the plaintiff is entitled to recover.

Judgment for the plaintiff.

SHAW and Others, Assignees of HOWARD and GIBBS, v. Lord
ALVANLEY.

Upon a *sci. fa.* on a judgment, the defendant having moved to plead several matters, viz., first, payment; secondly, that the judgment was fraudulent; thirdly, that the judgment was on a warrant of attorney fraudulently obtained; the court refused to allow the three pleas, and put the defendant to his election.

Wilde, Serjt., opposed a rule nisi for the defendant to plead to a *scire facias*, on a judgment, several matters, viz., first, payment; second, that the judgment had been obtained by fraud and covin; thirdly, that the judgment was entered up on a warrant of attorney, and that the warrant of attorney had been obtained by fraud and covin.

Peake, Serjt., urged that pleas equally inconsistent with each other were frequently to be found on record, as *non est factum* with *solvit ad diem*, and *solvit post diem*.

But the Court said, that the use of the rule nisi was to give the court a discretion upon such occasions, and they ordered, that the defendant should elect which of the pleas he would plead.

*EVANS v. SWETE.

[*326]

Where a plaintiff brought a writ of error on a nonsuit, the court refused to stay execution, at least, unless some real error were pointed out.

FINAL judgment of nonsuit was signed in this case, on the 9th of July; but a writ of error had previously been lodged with and allowed by the clerk of the errors, and a copy of the allowance was, immediately after signing judgment, served on the defendant's attorney, before he quitted the prothonotary's office; notwithstanding which, and without any rule for leave to take out execution, a writ of *testatum fieri facias* was on the next day sued out against the plaintiff and delivered to the sheriff of Middlesex, who took possession of the plaintiff's goods by virtue of the same. Upon an affidavit of these facts, and of the belief of the plaintiff's attorney that there was real error in the judgment,

Cross, Serjt., on the authority of *Levett v. Perry*, 5 T. R. 668, obtained a rule nisi to set aside this execution as irregular.

Pell and *Wilde*, Serjts., now showed cause against the rule. In cases where a writ of error has been manifestly and undeniably brought for delay, as, where the plaintiff in error or his attorney have made declarations to that effect, the courts have not allowed the writ of error to operate as a stay of execution. But error on a judgment of nonsuit must in general, from the very circumstances of the case, be deemed as manifestly brought for delay as if the party had openly declared it to be so. By submitting to be nonsuit, he in fact abandons his proceedings altogether, and is therefore estopped to *raise any further ques- [*327
tion concerning them. Undoubtedly these are cases in which error has
been sustained after a nonsuit; as where a jury have found costs upon a non-
suit, and the judgment has been erroneously entered for the costs so found;
Bac. Abr. Error A., 1 Roll. Abr. 744. But those cases do not apply to the
present, in which there is no such blunder in the entry of the judgment: and
in *Box v. Bennett*, 1 H. Bl. 432, it was expressly determined, that where error
had been sued out on a nonsuit, the court could not interfere to stay execution
unless some error were specifically pointed out.^(a) This case accords with
the rule of this court, *Easter*, 23 Eliz., and was confirmed on mature considera-
tion in *Kempland v. Macauley*, 4 T. R. 436; the subsequent case of *Levett*
v. Perry, although *Kempland v. Macauley* is cited in it, must have passed
without much discussion, as the note is short, and it does not appear whether

(a) Note to *Newell v. Pidgeon*, 1 Str. 235, Nolan's edition.

or no Lord KENYON, who spoke so decidedly a year before in *Kempland v. Macauley*, took any part in it.

Cross, Serjt., in support of the rule. *Levett v. Perry* is the last case on the subject, and can scarcely have been decided without due consideration, since *Kempland v. Macauley* is cited in it. The principle laid down in *Levett v. Perry* is clear and intelligible, and ought not lightly to be broken in upon, as a writ of error is a writ of right. (Here the court called on Cross to state what the error complained of was.) No case has decided that the party suing out the writ is bound to specify errors, and the authorities referred to in Bacon's and Rolle's Abridgments, are conclusive to show that error lies on a nonsuit. *328] In *Mee v. Hopkins*, 2 Dowl. & Ryl. 208, it is also *assumed that error lies in such a case, though the court held, the party was bound to state generally that real error existed.

BEST, C. J. A writ of error in a civil cause is a writ of right, and the court cannot in general proceed after it has been lodged with the proper officer. But it has been laid down in a series of cases too well established to be doubted, that where the writ is manifestly brought for delay, the court will not interfere to prevent execution; and it seems to have been generally assumed, that a writ of error on a nonsuit can scarcely be brought but for delay. It is difficult, indeed, to conceive how error can lie after a nonsuit, except for some mistake in entering up the judgment; error on the original record cannot be complained of when the plaintiff has abandoned all his proceedings. On the present occasion, though the court does not stay the writ of error, yet before it will stay execution, it requires the plaintiff to point out what the error is; the court is not satisfied with an affidavit of the attorney, merely stating in general terms that he believes there is error; and this requisition is conformable to the rule of Easter, 28 Eliz. Undoubtedly the cases on the subject are conflicting, this, however, is a question touching the practice of the Court of Common Pleas, and we must therefore abide by the decision in *Box v. Bennett*. But in *Kempland v. Macauley* the point was also much considered, and KENYON, C. J., and BULLER, J., gave very satisfactory reasons for the judgment they pronounced: *Levett v. Perry* is undoubtedly an authority the other way, but it is singular that Lord KENYON should not have taken any notice of his own decision in *Kempland v. Macauley* the year preceding; it is probable, therefore, that Lord KENYON was absent, and that the question passed without much attention. The balance of authorities clearly shows, that the present *329] is not a case in which the court will interfere to prevent execution.

PARK, J. It is clear, that in cases where execution is allowed to issue notwithstanding a writ of error, there must be satisfactory evidence that the writ of error is brought for delay; but, inasmuch as a writ of error brought on a nonsuit leaves no colour for denying the imputation of delay, the courts have required that on a rule for setting aside execution, there shall be an affidavit of some specific error, and the general assertion of the plaintiff's attorney to that effect is not sufficient.

BURROUGH, J. This case was first before me at chambers, where I considered it for some time, but after I had looked into the cases, particularly that of *Box v. Bennett*, I could no longer doubt on the subject.

GABRIEL, J. It does not appear how the practice of refusing to stay proceedings in execution, after the allowance of a writ of error first arose; however, it is too late now to alter it; but the rule is confined to cases in which the writ of error is manifestly brought for delay, as appears from the language of Lord KENYON and BULLER, J., in *Kempland v. Macauley*. How that is to be made out is a matter of evidence in each case. In *Levett v. Perry*, and *Masterman v. Grant*, 5 T. R. 714, the court required the declarations of the party or something tantamount; but in *Kempland v. Macauley* and *Box v. Bennett*, other circumstances were held sufficient at least to put the party who

sues out the writ of error upon showing that real error exists. When circumstances are strong to show intentions of delay, it is not a *hardship to call on the party to point out specific error, but an indulgence to allow [*330 him to do so, and the Court of King's Bench has recently required it in *Mee v. Hopkins*; at all events, in a question concerning the practice of the Common Pleas, this court must adhere to its own decision in *Box v. Bennett*, and the plaintiff's rule must be

Discharged.

GARLAND v. JEKYLL and Another.

Where, after a verdict for a sum of money, two questions were raised for the opinion of the court on a special case, and one of them at the time of argument was withdrawn by mutual consent: *Held*, that the plaintiff, retaining his verdict for the sum of money, was entitled to the costs of the special case, though the defendant succeeded on the point that was argued.

As this case (see ante, 273) was originally drawn up, two questions were submitted for the opinion of the court: one, "Whether the plaintiff, as lord of the manor, was, upon the death of Sir T. C. Bunbury, entitled to more than two heriots, (and if to more than two, to how many,) in respect of the several copyhold premises whereof Sir T. C. B. so died seised, not exceeding fourteen in the whole?"

The other, "Which horses out of the number claimed, (supposing the plaintiff was not entitled to recover the whole number,) should be selected as the heriots due to the plaintiff?"

When the argument took place, but not before, the latter question was, upon an intimation from the court, withdrawn by consent of counsel on both sides.

The first question having been determined in favour of the defendants, viz., "that the plaintiff was not entitled to more than two heriots," the prothonotary was not apprised that the second question had formed part of the case; and on the ground that no more had been *recovered than appeared to have [*331 been conceded by the defendants, refused to allow the plaintiff the costs of the special case, although there was a verdict for a certain sum and judgment thereon, in his favour; whereupon

Taddy, Serjt., obtained a rule nisi for the prothonotary to review his taxation, and allow the plaintiff these costs.

Vaughan and *Bosanquet*, Serjts., who now showed cause against the rule, contended, that in point of fact the defendants had succeeded upon the case, they having been always willing to pay two heriots, (as appeared by the statement of the first question,) and the plaintiff having recovered no more. Even where both parties were in pari conditione, the rule was, that neither should pay costs. *Spitta v. Woodman*, 3 Taunt. 406. It would, therefore, be doubly hard to charge the defendants after they had succeeded. The second point of the case having been withdrawn by mutual consent, was altogether out of the question.

Pell and *Taddy*, Serjts., in support of the rule, relied on the circumstance, that when the case was set down for argument, two points were stated for the opinion of the court; that the plaintiff was compelled to come prepared for both, and that it would not be known which way the court would have decided on the question that was withdrawn.

Best, C. J. The prothonotary has reported to us, that it was not stated to him there was any other question to be argued, than whether or no the plaintiff was entitled to more than two horses. On that view of the case, and according to the decision in *Spitta v. Woodman*. "it has been contended that the plaintiff is not entitled to the costs of the special case. But it appears [*332 that there was another question which the parties also came prepared to argue, and that was, which of the horses in question the plaintiff was entitled to seize

Who would have succeeded on that question we are now ignorant; perhaps the plaintiff might have been found entitled to the two best, perhaps to the two worst, perhaps to none. The parties having agreed to withdraw the question, it is impossible to say who would have prevailed. In *Spitta v. Woodman* the costs of a separate motion were in question, so that the court was enabled to divide the demand, allowing costs on a count on which the party succeeded; and if we could split the present cause, that decision might be in point for the defendant; but we are unable to do so, and we must frame our rules so as to meet the justice and convenience of the great mass of cases. We cannot say that the point which was not argued has been decided against the plaintiff, and it would produce great confusion and injustice if we were to refuse him costs under circumstances such as the present.

PARK, J. The greatest mischiefs are occasioned in the administration of justice by too great refinement; and if the defendant's application were to succeed, we should have a contest about costs in every special case. *Spitta v. Woodman* was a case in which there were several counts, and where there are many pleas or counts, it has always been the practice to divide the costs and apportion them to each party, according to the measure of his success; but we cannot so divide the various questions which may arise on every special case.

BURROUGH, J. The case was drawn up for the benefit of both parties, and *333] the plaintiff came prepared to argue both the questions on it: one of the questions having been withdrawn, it was never decided which of the horses in question the plaintiff was entitled to; but having come prepared to argue the question, he ought to have his costs.

GASELER, J., not having been present at the decision of the case, abstained from giving any opinion, and the rule was made

Absolute.

BRIGGS v. BOWGIN and Another.

In an action for assault and battery, with a separate count for false imprisonment, where the verdict was for 1s. damages, and the judge certified under 43 Eliz. c. 6, the court refused to tax the plaintiff his costs.

TRESPASS. The first count stated an assault and battery; the second an imprisonment.

At the trial before **ABBOTT, C. J.,** last Bristol assizes, the jury found a verdict for the plaintiff, damages 1s.; and the learned chief justice certified, under the 43 Eliz. c. 6.

Pell, Serjt., now moved for a rule to show cause why the prothonotary should not tax the plaintiff his costs, notwithstanding the certificate; on the ground, that this case was different from that of *Wiffin v. Kincard*, 2 N. R. 471, (in which a similar motion had been made without success,) the imprisonment in the present case being stated in a separate count, whereas in *Wiffin v. Kincard* it was stated in the same count as the assault.

But the Court were clear that this circumstance did not affect the certificate, and

Refused the rule.

*334]

*LYON v. WELDON and Others.

Goods which, with the consent of the true owner, come to the possession of a party after he becomes a bankrupt, do not vest in the assignees under 21 Jac. 1, c. 19, s. 11; and he becomes a bankrupt on committing the act of bankruptcy, which is followed up by a commission. A party who purchases goods under a distress irregularly conducted, has a sufficient title to maintain trover.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and taking away his goods. Pleas, first, that the supposed trespasses were done by authority of an act of parliament, made in the 13th year of Elizabeth, entitled "An

act touching orders for bankrupts;" second, by authority of an act of parliament, made in the first year of James I, entitled "An act for the better relief of the creditors against such as shall become bankrupts."

At the trial before BEST, C. J., London sittings after last term, the case appeared to be as follows. One Abrahams, who had married the plaintiff's daughter, rendered himself to the custody of the marshal of the King's Bench for a debt of 580*l.*, on the 2d of December, 1823.

On the 26th of February, 1824, he was duly declared a bankrupt, for having lain in prison till that time.

On the 9th of December, 1823, Nightingale, Abrahams' landlord, distrained for a year's rent, due the Michaelmas preceding.

One of the brokers who made the distress having been sworn by a constable, valued the goods, and the plaintiff purchased them under that valuation.

He then permitted them to remain on the premises in possession of his daughter, who still continued to reside there.

The plaintiff also thenceforth resided with her, and paid the rent of the premises.

On the 26th of February, 1824, the defendants, acting under the commission of bankrupt, which had been *issued against Abrahams, seized the goods which the plaintiff had, as above, purchased under Nightingale's dis- [*335 tress.

Upon these facts the plaintiff was nonsuited, with leave to move to set aside the nonsuit, and instead thereof enter a verdict for 55*l.*, the value of the goods.

Pell, Serjt., accordingly obtained a rule nisi to this effect, and

Vaughan and Cross, Serjts., now showed cause. First, the sale under the distress being irregular, the plaintiff never acquired any title to these goods. According to the provisions of 2 W. & M. c. 5, sess. 1, the person who makes the distress is to cause the goods to be appraised by two sworn brokers: here, one of the brokers himself made the distress. But the act of bankruptcy having relation back to the 2d of December, the first day of the bankrupt's imprisonment, the bankrupt's goods were in truth vested in his assignees before the sale on the 9th; and if it be urged that the landlord had a right to distrain them while on the premises, still, if the purchaser under the distress chose to leave them on the premises, in the possession of the bankrupt's wife, it is the same thing as if they were in the order and disposition of the bankrupt, as apparent owner, at the time of his bankruptcy, in which case they would belong to the assignees, under 21 Jac. 1, c. 19, s. 11. By the time of the bankruptcy the statute must mean the whole interval between the act of bankruptcy and suing out the commission, or either of those periods, indifferently. If it were otherwise, assignees would seldom be able to recover goods, on the ground of reputed ownership at the time of the possessor's becoming a bankrupt, for the party might always defeat them, by showing an anterior secret act of bankruptcy, at the time of which the goods *might not have been in his [*336 possession. In *Jones v. Dwyer*, 15 East, 21, it was questioned, how far the assignees could claim goods of which the bankrupt had been the reputed owner prior to the act of bankruptcy; and in *Lingham v. Biggs*, 1 B. & P. 82, which resembles the present case, the assignees were held entitled to goods in the bankrupt's possession at the time of the bankruptcy, though they had been purchased by a third person under an execution.

Pell and Wilde, Serjts., who were to have supported the rule, were stopped by the court.

BEST, C. J. At the time I nonsuited the plaintiff I had not the statute of James the First before me. If the view I then took of the policy of that statute was correct, the words of the eleventh section will not admit of the construction which I put on it. I am glad, therefore, (for I believe the plaintiff's to be an honest case,) that I reserved to him a right to move to set aside the nonsuit,

and to enter a verdict for the sum in dispute. It is now insisted that we cannot grant this rule; first, because from the irregularity of the sale under the distress no property in the goods passed to the plaintiff; and, secondly, if the goods were the property of the plaintiff, they became vested in the assignees by the operation of the statute of James. Upon the first point I must observe, that the statute of William to protect persons distrained on from an improvident or corrupt sale of goods, has provided that the person making the distress shall cause the goods to be appraised by two sworn brokers. That person must not appoint himself one of these brokers, for by so doing he defeats the object of

*337] the legislature, which was, that these brokers should be a check on him. But if such an irregularity made the sale of the goods void, men would be afraid to purchase goods sold under a distress, and thus poor tenants would suffer more than they did from the evil which the statute was intended to remedy. The 11 G. 2, c. 19, s. 19, has prevented the sale of the goods from being affected by any irregularity of the broker, and enacted, that for any injury that a tenant may sustain from irregularity, he may have his action; this statute has therefore taken away this objection, and the case of *Wallace v. King*, 1 H. Bl. 13, has decided the point. Wherever the person making the distress does make himself one of the sworn brokers, and the goods distrained are sold for less than their value, I think a jury would, by the damages they would give in an action against such person, teach him that the offices of distrainer and sworn broker are incompatible. As to the second point, the facts are extremely complicated. On the 2d of December, 1823, the bankrupt was the *true owner* of the goods; on that day he went to prison. By lying in prison he committed an act of bankruptcy which related back to the 2d of December. From that day he could not part with his interest in the goods, but they were liable to a distress for the rent of the house in which they were kept, and on the 9th of December they were distrained. This distress put an end to the real ownership of the bankrupt. The plaintiff bought the goods under the distress, and permitted them to remain in the possession of the bankrupt's wife and family: from this time they were in the *possession, order, and disposition* of the bankrupt *as the reputed owner*. Before the goods were thus in his possession, order, and disposition, his bankruptcy was by relation of law complete. Now the statute of James says, "If

*338] any persons, *at such time as they shall become bankrupts*, shall by the consent and permission of the true owner have in their possession, order, and disposition, any goods and chattels, whereof they shall be the reputed owners, and take upon themselves the sale, alteration, and disposition as owners, the commissioners shall have power to sell and dispose of the same." These goods did not get back into the possession of the bankrupt until after he had committed an act of bankruptcy, and therefore do not pass to the assignees under this statute. It has been argued that the words, at the *time they shall become bankrupts*, are to be construed, at the time they shall be declared bankrupts; but such a construction would create an anomaly in the bankrupt laws. The bankrupt is divested of all right in his estate from the time of the act of bankruptcy, and no debts were, before Sir Samuel Romilly's act, provable under his commission but what were contracted before that period. We must consider that he became a bankrupt within the meaning of this clause of the statute of James, at the same time that he becomes a bankrupt under all the other parts of the bankrupt law. The words of this section are too clear to allow any other construction. I think, on consideration, that this construction is agreeable to the spirit of the act. The spirit of the act is, that where persons are induced to give credit by seeing a bankrupt in possession of property, that property, whether it be the bankrupt's or another's, shall be applied in payment of the debts provable under his commission. There can be no other just principle on which one man's debts are to be paid with the property of another. The persons whose debts were provable under the commission

could not have given the bankrupt credit on account of property of which he did not get the possession until after his bankruptcy; for before the statute of G. 3, no debts were provable but such as were contracted before *the [*339 act of bankruptcy. The legislature, which has extended the right of proving debts, can alone accommodate the law to the now state of things. I am therefore of opinion that the nonsuit must be set aside, and a verdict entered for the plaintiff.

PARK, J. The chief question in this case arises on the construction of 21 Jac. 1, c. 19, and the defendants, in order to succeed, must put an interpretation on the words of the statute which they will not bear. The preamble to the eleventh section is almost decisive of the question, although a construction has been put on that beyond what its language imports; but is there any thing in that preamble which applies to the facts now under consideration? Did the bankrupt first convey the goods away and then keep the same? The intention of the legislature was, to prevent fraudulent transfers for the purpose of deception, and it proceeds to enact, that the commissioners may dispose of goods, which, with the consent of the true owner, the bankrupt may have in his possession as reputed owner, at such time as he shall become a bankrupt. I dissent from the argument, that the words "at such time as he shall become a bankrupt," may apply either to the date of the commission or the act of bankruptcy; such a construction would introduce nothing but confusion, as commissions are often sued out and not acted on. In the present case, Abrahams was the real owner of the goods at the time he went to prison. I admit, that upon his becoming a bankrupt, the assignees became owners from that time; but the landlord had a right to distrain the goods for rent, even though they were the property of the assignees: under that distress the plaintiff bought the goods, that his daughter might not be deprived of necessaries while her husband was in jail; but that does not make her husband reputed owner of them at the time he became a *bankrupt on the 2d of December. It is impossible for us [*340 to put on this statute a construction so penal. As to the apprehension of the assignees losing property by the disclosure of anterior secret acts of bankruptcy, the inconvenience, if any, must be remedied by the legislature; but no such inconvenience has yet been experienced, and large sums have frequently been recovered by assignees, notwithstanding the secret acts which must often have had place.

GASKELL, J. The only doubt in my mind was, whether the plaintiff acquired a sufficient title by the sale under the distress, considering the way in which it was conducted. But, independently of the stat. 11 G. 2, c. 19, which has cured any defects occasioned by mere irregularity, it is for the interest of the party distrained on that purchasers under the sale should be protected as far as possible; because if it were otherwise the insecurity of the title would materially affect the price of the goods. However, if any doubt ever existed on the subject, it has been removed by the case of *Wallace v. King*. On the second point I agree with the rest of the court.

BURROUGH, J., had left the court, but the chief justice stated that he concurred in the decision pronounced, which was, that a

Verdict be entered for the plaintiff for 55*l.*, the value of the goods.

*JOHNSON v. LAWSON and Another.

[*341]

Defendants in replevin, who avowed generally under 11 G. 2, c. 19, for rent due on a demise, under which the plaintiff held as their tenant, were held entitled to double costs upon a judgment in their favour, notwithstanding they pleaded many other avowries in various rights, from which circumstance it was suggested that they did not distrain as landlords, but with a view merely to try a title.

Expenses of successful searches for pedigree are allowed for by the prothonotary in taking costs.

REPLEVIN for goods; the defendants pleaded twelve avowries and cognisances in various rights: upon all these issue was joined, and on the fifth, in which it was stated, that the distress was made for rent due on a demise under which the plaintiff held certain lands as tenant to the defendants, a verdict was found, and judgment entered up for the defendants.

The prothonotary having allowed the defendants double costs under 11 G. 2, c. 19, s. 22, (which double costs he calculated as follows, viz., single 440*l.* 1*s.* 9*d.*; half that amount, 220*l.* 0*s.* 10*d.*: total costs allowed, 660*l.* 2*s.* 7*d.*.) including the expenses of searching for pedigrees in various public offices, parish churches, &c.,

Peake, Serjt., moved that the prothonotary might review his taxation, on three grounds:

First, that this replevin, as might be inferred from the various avowries, was brought to try a question of title, and not merely to recover rent: and that the statute 11 G. 2, c. 19, which gives double costs in replevin, was meant only for the security of landlords when the mere recovery of rent was the object for distraining: this might be inferred from the title, preamble, and predominant provisions of that act; and the clause giving double costs being considered as penal, had been holden not to extend to a rent charge. *Linton v. Collins*, 2 Wils. 429; *Bulpit v. Clarke*, 1 N. R. 56. So where a canal act authorized *342] the proprietors to purchase lands, with a power for the owner of the lands to distrain for the annual rent, both the K. B. and C. P. held the distrainor not entitled to double costs. *Leominster Canal Company v. Morris*, 7 T. R. 500; *Same v. Cowell*, 1 B. & P. 213. So, where the distress was made for heriot custom, the provision for double costs applying only to heriot service. *Lloyd v. Winton*, 2 Wils. 28.

Secondly, that in calculating the double costs the prothonotary had taken half the single, without distinguishing general disbursements from regular attorney's charges; whereas he ought to have extracted the general disbursements from the single costs, and then have added half the attorney's charges that remained.

Thirdly, that he ought not to have allowed expenses merely preparatory to the suit, such as searching for pedigrees at public offices and in parish churches. In *Severn v. Olive*, 3 B. & B. 72, the court refused to allow the expenses of scientific experiments necessary to the determination of the question at issue.

The Court thought there was nothing in the second objection; and as to the third, the prothonotary having reported, that it was always the practice to allow for successful searches in registers to establish pedigrees; and having referred to a MS. case, (*Whitehouse v. Penn*, C. B. 1808.) in which such charges had been allowed, the court confirmed the prothonotary's taxation in that respect, and granted a rule nisi on the first ground only.

Taddy, Serjt., who showed cause, insisted, that on the fifth avowry, on which judgment was entered up, it was distinctly alleged that the distress was made on the plaintiff, as tenant to the defendants; and that, therefore, the case was expressly within the clause of the statute which gave double costs.

**Peake* was heard in support of his rule.

*343] *Best*, C. J. There are many cases in which tenants are placed in an unpleasant situation, by conflicting claims to the land they occupy; but the course for them to pursue in such cases is clearly pointed out by law, and they ought to file a bill of interpleader, and put the litigant parties to contend with each other. I am not clear that the present case is not one of those that the legislature actually contemplated, because tenants sometimes lend themselves improperly to a new claimant; but whether this be so or not, we must look to the language of the statute and the record, and ground our decision on them. The avowry is for rent due on a demise, under which the plaintiff is alleged to have holden certain lands as tenant to the defendants. That appearing on the

record, the case is so completely within the words of the act, that whatever the hardship may be, the plaintiff must pay the double costs: he has clearly been distrained on for rent service; and the words of the twenty-second section are, "whereas great difficulties often arise in making avowries or cognisance upon distresses for rent, quit-rents, reliefs, heriots, and other services, be it enacted, that it shall be lawful for all defendants in replevin to avow or make cognisance generally; and if the plaintiff shall become nonsuit, discontinue his action, or have judgment given against him, the defendant in such replevin shall recover double costs of suit."

PARK, J. The statute was passed eighty-six years ago, and though there must, in the interval, have been many distresses for the purpose of trying title, the claim to double costs has never before been contested. We are bound by the words of the act; and in the *Leominster Canal Company v. Cowell*, EYRE, C. J., says, "The 'landlord may avow generally, and is entitled to double costs.'" I think, therefore, that this rule ought to be discharged. [*344]

BURROUGH, J. Here there was an existing lease, and the party claiming title was compelled to proceed by distress; if the tenant chooses to side with either party, he must take the consequences. He might have filed a bill of interpleader.

GASELEE, J. We cannot inquire whether the distress was made by the landlord or heir at law. The general avowry is given by the statute and the defendant is entitled to his double costs.

Rule discharged.

SCOTT v. BYE.

A writ of false judgment does not lie from the Southwark Court of Requests to a court of common law.

THIS was a writ of false judgment issued out of Chancery, and directed to the sheriff of Surry, commanding him, if Peter Scott should give security to prosecute, to go in person to the Court of Requests for the borough of Southwark and East half hundred of Brixton, taking with him four discreet and lawful knights of his county, and in open court there to cause the plaint to be recorded between Richard Bye and Peter Scott, and to have the record in the Court of Common Pleas, at Westminster, under his seal and the seals of four lawful men of the Court of Requests.

The sheriff returned the plaint duly recorded; it stated that Richard Bye had come to the Court of Requests in his own person, and complained before the "commissioners, that whereas Peter Scott being an inhabitant within the East half hundred of Brixton and the jurisdiction of the court, was indebted to the said Richard in the sum of 2*l.* 11*s.* 4*d.*, which the said Peter refused to pay, the said Richard prayed the summons of the court: that the summons was granted; and a second peremptory summons; upon which the said Peter came into the court; and the said Richard declared against him that the said Peter being resident within the jurisdiction of the court was indebted to the said Richard in the sum of 2*l.* 11*s.* 4*d.* That the commissioners of the court, duly appointed and sworn, according to the statute, having heard all the things which the said Peter could allege in his defence, adjudged that a debt of 2*l.* 11*s.* 4*d.* was due from the said Peter to the said Richard, and ordered him to pay it into court, with 13*s.* 6*d.* costs, in seven days; which said debt, costs, and charges, amounted in the whole to 3*l.* 4*s.* 10*d.*; and the said Peter, in mercy, &c. And thereupon the said Peter said, that the record aforesaid was vicious, and in many respects defective, and that false judgment had been given against him, because it was not stated in the record, how or in what manner the said Peter became indebted to the said Richard, or for or upon what consideration the supposed debt was founded, or whether it was not the balance of

an account on demand, originally exceeding 5*l.*, and that it did not appear, on the adjudication of the commissioners, that the said Peter was a person residing within the jurisdiction of the court; and he prayed that the judgment might be reversed and annulled.

The said Richard said, that the said record was in no wise vicious or defective, nor the judgment false, and prayed that the court here might proceed to the examination of the record.

A day was therefore given to the parties here.

*346] *The Court now referred to the language of Holt, C. J., in *Groenvelt v. Burwell*, 1 Salk. 263, Carth. 421, "that wherever a new jurisdiction is erected by act of parliament, and the court or judge that exercises this jurisdiction acts as a court or judge of record, according to the course of the common law, a writ of error lies on their judgments; but, where they act in a summary method, or in a new course, different from the common law, there a writ of error lies not, but a certiorari," and asked *Lawes*, Serjt., who was of counsel for Peter Scott, whether he could support this writ of false judgment.

Lawes, Serjt. *Dr. Groenvelt's* case is the only one which lays down such a principle. In Fitz. N. B. 18, Co. Lit. 188 b, 3 Bl. Com. 406. 34, it is laid down, without distinction, that false judgment lies from any base court not of record. In *Finch's Law*, 484, it is said generally, false judgment lies upon error in a base court. *Dr. Groenvelt's* case arose out of the peculiar jurisdiction of the college of physicians, in which there is neither indictment nor formal judgment; and that, according to the report in Carthew, was one of the grounds of the decision in K. B. But in the present case there is a declaration and a formal judgment; so that if it be contended that false judgment lies only from a common law court not of record, this may be contended to be such a court. The commissioners may be assimilated to the suitors in the county court; it is stated that, after the second peremptory summons, the plaintiff declared; judgment is given in a formal manner, and entered in a book under 46 G. 3, c. 87, s. 6, and the defendant is stated to be in mercy, as in any other common law court. Then it was clearly the intention of the legislature that parties within the jurisdiction of this court *should have a right of appeal; for the 4 G. 4, c. 123, repeals a clause in the 46 G. 3, c. 87, by which the parties were prohibited from removing their causes by certiorari or otherwise. If the words "or otherwise" do not include writs of false judgment, they are without operation. Supposing the writ to lie, the proceedings are clearly vicious, because they do not state the nature of the debt. *Sparks v. Jobber*, 2 Ld. Raym. 1450; *Wyatt v. Effington*, id. 1410; *Davy v. Baker*, 4 Burr. 2472.

Taddy, Serjt., contra, argued that a writ of false judgment would only lie to a base common law court, such as the county, hundred, or baron court, and that the experiment of applying it to a court of conscience had never been tried before.

BEST, C. J. The matters which have in modern times been determined in base courts, have been so small that no one has thought of incurring the expense of bringing them before this court. We must look into the old authors, to see from what courts judgments may be removed by writs of false judgment. Fitzherbert, in his *Natura Brevium*, says, that a writ of false judgment lies to any hundred court, county court, and court baron. Lord Coke and Blackstone say, that this writ lies to any *base court*: Coke and Blackstone refer to Fitzherbert as their authority. The apparent difference between these authors is reconciled, when we learn that there were no other *base courts* but those enumerated by Fitzherbert, in which the pleadings, evidence, and judgment were subject to the rules of the common law. The Common Pleas, therefore, must be considered competent to review the decisions of such courts. In the Court of Requests, pleadings in writing are not required, *348] and would *be highly inconvenient. A party may be examined as a witness, and the judgment is to be according to equity and good con-

science, that is such as plain men, ignorant of the rules of law, which the judges of that court must be, shall think just. If the expense and delay that must be occasioned by an appeal to the Common Pleas did not entirely defeat the object of the legislature in creating courts of request, can a court, the decisions of which are wisely subjected to fixed rules, be a proper tribunal to correct the proceedings of courts where judges are left to the guidance of their own arbitrary discretion? The reasoning of Lord Holt in *Dr. Groenvell's* case applies to this. He says, that a decision of the College of Physicians cannot be examined upon a writ of error, because the College of Physicians does not proceed on the principles of the common law. Now, the difference between a writ of error and a writ of false judgment is, that the one lies to a court of record, and the other to an inferior court not of record. If a common law court cannot correct the errors of the first by writ of error, it cannot correct the errors of the second by writ of false judgment. This case must, therefore, be sent back to the Court of Requests by writ of procedendo.

PARK, J. I am of the same opinion, and think we are bound by the strong language of Lord Holt in *Dr. Groenvell's* case. It would be unnecessary and improper for these courts of conscience to proceed according to common law; the object of the legislature in establishing them, was to enable poor parties to recover their debts cheaply and expeditiously, but if long pleadings were allowed, the expense would be intolerable, and there is not a syllable in the act authorizing any charge for a declaration. Notice is to be given to the defendant, who is to come before the commissioners, and they are thereupon to make such orders, and take such "proceedings touching the debt claimed, as shall stand with equity and good conscience." [349]

BURROUGH, J. The words "equity and good conscience" imply a course of proceeding different from that of the common law, and one of which we are not competent to form a judgment. Courts of conscience have existed for 200 years, and no such writ as the present has ever issued to them before.

GASELEE, J. In the 46 G. 3, there is nothing to authorize the practice of written pleadings in this court of conscience. The course prescribed is by summons, hearing, and attachment. We have no authority to revise the proceedings of such a court, and therefore this case must be sent back, and the plaintiff

Take nothing.

SHORT v. HUBBARD and Two Others.

A rent charge is within the meaning of the 11 G. 2, c. 19, s. 23; upon a replevin, therefore, of a distress for such a rent, the sheriff may take and assign a bond as in a replevin for any other kind of rent:

Held, that a bond so taken by the sheriff, and conditioned for appearance at the next county court; prosecuting the plaintiff with effect; making a return if adjudged; and indemnifying the sheriff from all charges and damages by reason of the replevin, was authorized by the above statute.

THE plaintiff, as assignee of the sheriff of Lincolnshire, declared that on, &c., at, &c., he distrained the goods of Hubbard for the arrears of a rent-charge issuing out of and charged upon a messuage and premises in and on which the distress was made; that Hubbard thereupon, within five days, made his plaint to the sheriff, praying that the goods might be replevied; that the "sheriff did thereupon, according to the form of the statute in such case made [350 and provided, (a) take from Hubbard and the two other defendants, as respon-

(a) By 11 G. 2, c. 19, s. 23, it is enacted, that "All sheriffs and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent, take, in their own names, from the plaintiff and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer,) and conditioned, for prosecuting

sible sureties, a bond in double the value of the goods distrained, (the value having been first ascertained by a credible witness duly sworn,) the condition of which bond was, "that if Hubbard should *appear at the next county court at Lincoln*, and enter his plaint there, and prosecute the same with effect against the plaintiff for taking and detaining the said goods, and should make a return thereof, in case a return should in due course of law be adjudged; and also if the defendants, their heirs, executors or administrators, should from time to time, and at all times thereafter, *save harmless and keep indemnified, the sheriff, his undersheriff, deputy or deputies, bailiff or bailiffs, and every of them, of and from all costs, charges, damages, and expenses that he, they, or any of* *351] *them might sustain or be put to, for or by reason of the replevying and delivery of the aforesaid goods and chattels to the said Hubbard, or for touching and concerning any suit, matter, or thing relating thereunto,*" then the obligation was to be void: that the sheriff thereupon replevied and made deliverance of the goods to Hubbard, who, at the next county court, appeared and levied his plaint for the taking of the goods; and found pledges for the prosecution of the plaint, and for a return of the goods if a return should be awarded; which plaint was afterwards removed by re. fa. lo. into the Common Pleas, where the plaintiff, Short, by his attorney, offered himself on the fourth day against Hubbard, who made default and did not further prosecute his plaint, whereupon it was adjudged by the court that he should take nothing by his plaint; that he and his pledges should be in mercy; that Short should go thereof without day, and have a return of the goods. It was then averred that Hubbard made no return; whereby the bond became forfeited to the sheriff, and the money therein specified remaining unpaid, the sheriff, at the request of the plaintiff, by an endorsement on the bond, duly made and attested in the presence of two credible witnesses, and sealed with the seal of the office of sheriff of the county of Lincoln, assigned the bond to Short, according to the form of the statute; as by the assignment endorsed thereon, and duly stamped before the commencement of the action, according to the form of the statute, fully appeared; of which premises the defendant had notice, by means whereof an action accrued to the plaintiff as assignee of the sheriff.

General demurrer and joinder.

Vaughan, Serjt., in support of the demurrer.

First, the sheriff is not authorized by the statute 11 G. 2, c. 19, to take a *352] replevin bond on a distress for "a rent-charge. From the title, and the various provisions of that act, it must be concluded that it was passed solely with reference to matters between landlord and tenant. With the exception of the twenty-third section, the word rent almost throughout the act is accompanied with an express reference to those parties; it ought, therefore, in that section, to be taken under the same restrictions as in all the others. The word rent-charge occurs no where in the act, although quit-rents, reliefs, heriots, and other services are specified in sect. 22, and it would have been equally easy to have specified rent-charge if the legislature proposed to include that also. It has been expressly holden, that an avowant for a rent-charge who succeeds in the replevin is not entitled to double costs under the twenty-second section of

the suit with effect and without delay, and for duly returning the goods and chattels distrained in case a return shall be awarded, before any deliverance be made of the distress; and that such sheriff or other officer as aforesaid taking any such bond shall, at the request and cost of the avowant or person making consuance, assign such bond to the avowant or person aforesaid, by endorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses, which may be done without any stamp, provided the assignment so endorsed be duly stamped before any action brought thereupon; and if the bond so taken and assigned be forfeited, the avowant or person making consuance may bring an action and recover thereupon in his own name; and the court where such action shall be brought may, by a rule of the same court, give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance to such bond."

the act. *Leominster Canal Company v. Norris*, 7 T. R. 500: in *Leominster Canal Company v. Cowell*, 1 B. & P. 214, EYRE, C. J., says, without any qualification, that a rent-charge is not within the 11 G. 2; and in *London v. Collins*, Willes, 429, a doubt was raised on the same subject.

Secondly, the bond was void at all events, from the circumstance of the sheriff's having inserted a condition for indemnifying himself, which is nowhere authorized by the act, and which the sheriff has therefore no right to impose on the obligor. The bond in these cases ought to follow the provisions of the 11 G. 2, c. 19, with the same degree of strictness as a bail-bond pursues those of the 23 H. 6, and a deviation from that statute has always been esteemed fatal.

Taddy, Serjt., contra. The twenty-third section of 11 G. 2, c. 19, applies to every species of rent, for the word is employed generally and without restriction. *From the language of the tenth section, it appears clearly that it was not proposed to confine the provisions of the statute to the case of [*353 landlord and tenant, for that section specifies "landlords and lessors, and other persons taking distresses for rent," and makes it lawful to secure the distress on the premises "chargeable with the rent." There are other statutes in which the word rent has been used in a sense equally comprehensive, as 4 G. 2, c. 28; 17 Car. 2, c. 7, s. 3; 7 H. 8, c. 4, s. 3; 21 H. 8, c. 19, s. 3, and 32 H. 8, c. 37.

Then, as to the form of the bond, it has been the uniform practice for the sheriff to take it in the present form, (a) which is to be found in most of the books of practice, 1 Wms. Saund. 195, n. 3; and in *Blackett v. Crissop*, 1 Ld. Raym. 278,—under the statute of Westminster 2, which requires the sheriff, before executing a writ of replevin, to take from the plaintiff pledges to prosecute, and to return the cattle if a return should be adjudged, and ordains, that if the sheriff take the pledges in any other manner he shall be answerable,—it was holden he might take a bond conditioned for appearance at the next county court, for prosecuting with effect, for making return if adjudged, and for saving harmless the sheriff. But the statute 11 G. 2, does not prohibit the sheriff from taking an indemnity, nor does it, like the statute of Westminster, state that the sheriff shall be answerable if he take pledges in any manner other than that pointed out by the statute. There are other cases in which bonds similar to the present have come before the court on demurrer, and no objection to the indemnity clause has *been taken; as in *Archer v. Dudley*, 1 B. & P. 381; *Morgan v. Griffith*, 7 Mod. 380; *Glover v. Coles*, 7 B. M. 231: it is clear, too, [*354 from *Dias v. Freeman*, 5 T. R. 195, that the statute, as to the twenty-third section at least, is not construed strictly, and where the sheriff assigns the bond, the clause for indemnity is without effect, as he would no longer be able to sue on it. With respect to the condition to appear at the next county court and prosecute with effect, it seems from *Phillips v. Price*, 3 M. & S. 180, that it is sufficient if the party shows he has prosecuted with effect.

Vaughan, in reply, insisted that *Blackett v. Crissop*, a decision on the construction of 13 Ed. 1, c. 2, could not apply to bonds authorized only by 11 G. 2, c. 19; and that, according to that statute, the condition ought only to have been for prosecuting with effect, and for returning the goods in case a return should be awarded. If the party replevying had refused to execute a bond with a clause of indemnity, offering at the same time to execute one according to the statute, and the sheriff had thereupon refused to deliver the goods, an action would lie against him at the suit of the party. With respect to the first point in the case, if it were holden that a rent-charge was within the provisions of 11 G. 2, c. 19, the word *rent* would receive a varying construction in the various clauses of the same statute.

(a) Upon inquiry made by desire of the court on a preceding day, this was found to be the case in the counties in which inquiry could then be made, viz., Middlesex, Surrey, London.

BEST, C. J. Two questions are raised by this demurrer; first, whether a sheriff can take an assignable bond on granting a replevin on a distress for a rent-charge under the 11 G. 2, c. 19, s. 23? Second, whether a sheriff can, *355] under this clause of the statute, *take such bond as that which is set out in the declaration in this case?

The twenty-third section of the 11 G. 2, is remedial, and we are authorized by the rules for construing statutes, in putting upon it a liberal construction. The twenty-second section is penal, and according to the same rules it has been construed strictly as appears from the cases to which we have referred: but there is no impropriety in putting a strict construction on a penal clause, and a liberal construction on a remedial clause, in the same act of parliament. This has been done on the statutes, which make it a felony to burn houses and other property, and gives those who suffer from the felony a remedy against the hundred. If the words of the clauses were the same, I should not feel myself much embarrassed by the cases which have decided that a party who replevies goods distrained for a rent-charge does not subject himself to the *penalty* of double costs. But there is a material difference in the language of the two sections. In sect. 22, the words are, "rent, quit-rent, reliefs, and other services." The words after rent, show, that the general import of the term was to be restrained, and was only to include *rent-service*. In the twenty-third section the word *rent* stands alone: there are no terms of qualification or restraint. It embraces every rent, for the owners of all rents have an equal right to the security which this clause affords. It has been argued, that from the title of the act and the language of the different clauses, it was only meant to apply to cases of landlord and tenant. The tenth section shows that other rents, besides such as were reserved by leases, were included within the act: the preamble to this section speaks of landlords and *other persons* taking distresses for rent; and the enacting part of the clause says, that "it shall be lawful for any person taking any distress for *356] *any kind of rent*, to *impound, &c., and to *appraise, sell, and dispose of the same* on the premises, *in like manner as any person taking a distress for rent may now do* off the premises under 2 W. & M. c. 5, and 4 G. 2, c. 28." This clause proves, that a distress *for any kind of rent* may be appraised and sold under the statutes to which it refers *off* the premises, and gives the same power of sale *on* the premises. It seems impossible to suppose that rent-charges are not within this clause. A rent-charge is a *kind of rent*. Besides, could the legislature intend to provide for the sale of a distress for a rent-seck, for which no distress could be taken until the 4 G. 2, and not to provide for the sale of a distress for a rent-charge, to which distress was always incident? The legislature considered distresses for rent-charges as being made saleable by the 2 W. & M., and, therefore, they were not mentioned in the 4 G. 2. If rent-charges are included under the words, *any rent reserved and due upon any demise, lease, or contract* whatsoever, in the statute of W. & M.; and the words, *any kind of rent*, in the tenth section of the 11 G. 2, they must be included in the word *rent* in the twenty-third section of the same act. The legislature would not give the same power of sale of the distress for a rent-charge as of other rents, and not give the same remedy for preventing a vexatious replevin. Nor could the legislature mean to put the owner of a rent-charge in a worse situation than the owner of a rent-seck; and the latter is by 4 G. 2 brought within the twenty-third section of the 11 G. 2. Upon the second point there is some difficulty. I was led into much difficulty by not advertent to the difference between the words of the twenty-third section of the 11 G. 2, and those of the 23 H. 6, c. 9. By the express terms of the statute of H. 6, any bail-bond taken in any other form than that which is prescribed by that statute *357] is void. There is no such clause in the 11 G. 2. *We have inquired, and find it has long been the practice of sheriffs to take bonds nearly in the same form with that which is set out in the declaration in this cause. Courts

of justice incline strongly against overturning a practice that has long prevailed, and from which no evil can result. Some of these bonds have at different times been brought under the view of the courts of Westminster, and no objection was made to them either by the counsel or the judges. Indeed, this bond is in substance and effect such as the statute directs. The statute says the bond shall be with a condition, that the plaintiff in replevin prosecute his suit with effect *and without delay, and duly return the goods distrained in case a return shall be awarded.* The bond is, that the plaintiff in replevin shall *appear at the next county court, and enter his plaint, and prosecute the same with effect, and shall make a return of the goods in case a return be awarded; and that he shall indemnify the sheriff, and his undersheriff and bailiffs.* Now, appearing at the next county court and prosecuting with effect, is the same in substance as prosecuting without delay and with effect; and if he prosecuted without delay and with effect, or returned the goods, if return be awarded, he prevents the sheriff from being damnified. The clause of indemnity adds nothing to the words that precede it, and is mere surplusage. The statute of Westminster the 2d directs, that sheriffs or bailiffs shall not only receive of the plaintiff in replevin *pledges* for the prosecuting the suit before they make deliverance of the distress, but also for the return of the beasts, if return be awarded. It was decided in *Blackett v. Crissop*, that a bond given under this statute conditioned to *appear at the next county court* and prosecute his action with effect for wrongfully taking his gelding, and to make return thereof if return should be adjudged, and to *save harmless the sheriffs by delivery of the said gelding*, was not void. TREBY and HOLT said, *such a bond will* [*358] *answer the intent of the statute.* POWELL, speaking of the clause of indemnity, says, "where the sheriff takes a bond or promise to keep him harmless in the doing a lawful act, the bond or promise is good; but if it be in the doing that which he ought not to do, the bond or promise is void." (a) The practice of modern times, of staying proceedings until a sheriff is indemnified, is agreeable to this doctrine. This statute requires a bond with a condition, substantially the same as that required by the statute of G. 2. The variance from the form prescribed by the statute of Westminster the 2d in the bond in the case cited, is nearly the same as that between the bond set out in the declaration and the bond prescribed by 11 G. 2. A case that shows that such a bond is sufficient under the statute of Westminster, is an authority to prove this bond sufficient under the statute of George. Practice, reason, and authority, require that our judgment should be for the plaintiff.

PARK, J. I am of the same opinion, and think this case is clearly within the meaning of the twenty-third section of 11 G. 2. I was much struck with the observation as to the statute 2 W. & M., because distresses for rent-charge having constantly been sold under the provisions of that act, we ought to put the same construction on this. With regard to the form in which the bond has been taken, I at first entertained some doubt; but the various statutes on the subject must all be considered together, and the statute of Westm. 2, does not give so much latitude to the sheriff as that of 11 G. 2. Under the former, the sheriff is to take pledges to prosecute, and to be answerable if he takes them in any manner other than that prescribed by the statute; under the latter, he is to take a bond conditioned for prosecuting the suit with effect and [*359] without delay: the case, therefore, in Lord Raymond is most material, because, if a condition to indemnify the sheriff be good in a bond under the statute of Westminster 2, a fortiori, it ought not to be impugned in a bond taken under 11 G. 2. Besides this, from the passing of the statute to the present time it has been the uniform course to take bonds in this form; in no case has the objection now made been urged, and the condition in effect exacts no more than the sheriff is entitled to under the statute.

BURROUGH, J. In the course of a long special pleading life, I have continually been led to consider the statute now in question, and I am satisfied that rent-charge is within the scope of the twenty-third section. With respect to the form of the bond I entertained at first some doubts, but am now convinced that it agrees with the statute, and only indemnifies the sheriff against the consequences of his lawful acts.

GASELEE, J. I am of the same opinion. On the second point I entertained at first some doubt, but am now satisfied that the bond is conformable to the statute. This case is very different from that of bail-bonds; the statute of H. 6, under which they are taken, was passed in favour of defendants, and directs a particular form to be observed, so that if there be any departure from it the bond is void; but the statute of 11 G. 2 was intended for the protection of avowants; and if, under the terms of Westm. 2, which are not so extensive, it has been expressly decided that the sheriff is authorized to take a bond conditioned for an indemnity, assuredly we ought not to put a different construction upon a subsequent statute in *pari materia*. If, indeed, the statute had added that *360] the bond should be void unless taken in a particular form, the case might have been otherwise; for an instrument void in part under a statute is void for the whole, though at common law the objectionable part may be separated; (a distinction which was argued at length in *Newman v. Newman*, 4 M. & S. 66.) The only difficulty here is, whether the bond in its present form be assignable, and perhaps a question might arise whether or no the assignee could sue on the indemnity clause. However, upon the whole, I think the sheriff was authorized in taking the bond, and that the present action may clearly be maintained.

Judgment for the plaintiff.

PRENTICE v. BLOTT.

In a country cause in C. B., the plaintiff is not bound to proceed to trial at the next assizes after the term in which issue is joined.

D'Oyly, Serjt., moved for judgment as in case of a nonsuit, upon an affidavit that issue was joined last term, and that no notice of trial was given, nor did the plaintiff proceed to trial at the then next assizes, although there was time sufficient to proceed to trial after issue was joined. He cited *Frampton v. Payne*, 1 H. Bl. 65; *Woulfe v. Sholls*, 1 H. Bl. 282, and *Hall v. Buchanan*, 2 T. R. 734, in support of his motion.

But the secondaries on being applied to by the Court, referred to a MSS. case, C. B. Trinity, 1812, in which a motion made under similar circumstances was held premature, and *D'Oyly*

Took nothing.

*361] *THISTLETHWAYTE, Demandant; MAIDMENT, Tenant.

THE acknowledgment in this recovery was taken at Meerut, in the East Indies, and there was an erasure on it of which no notice was taken by the magistrate before whom the acknowledgment was made. The erasure, however, only affected an impossible date, "Meerut, Jan. 3rd, one thousand eight hundred and twenty-three," the word *three* being erased, and the writ having issued, Jan. 2d, 1823.

There was an affidavit that the acknowledgment was taken before F. K. Smith, a magistrate at Meerut competent to administer an oath, and that no notary public resided in the district, but there was no affidavit authenticating the magistrate's signature.

Under these circumstances the Court refused to let the fine pass.

LANCHESTER v. FREWER.

Twenty parishioners joined at a vestry in signing an order for the repairs of the church, and one of them, a churchwarden, paid the artificers, but the rate for reimbursing him was quashed: *Held*, that he could not sue for contribution the persons who signed the order.

THIS was an action of assumpsit. The declaration contained the usual money counts. The defendant pleaded, first, non-assumpsit; and, secondly, the statute of limitations, on which pleas issues were joined. The *cause was tried before ABBOTT, C. J., at the March assizes for Suffolk, 1824, [*362 when a verdict was found for the plaintiff, with 25*l.* 5*s.* 8*d.* damages, subject to the opinion of the Court of Common Pleas upon a case which stated in substance, that

On the 15th of April, 1811, the plaintiff, and one William Tricker, were appointed churchwardens of the parish of Saint James in Bury St. Edmunds, for the ensuing year.

At that time the tower of the parish church was much out of repair, and had been presented by the preceding churchwardens on that account.

On the 8th of July, 1811, a meeting of the parishioners was duly held in the vestry-room of the said parish when the following order was made.

"At this meeting it is ordered, that the churchwardens be authorized to put a new roof on the tower belonging to this parish in a workmanlike manner." This order was signed by the plaintiff and Tricker, and by twenty other parishioners, of whom the defendant was one.

In pursuance thereof tradesmen were employed by the said churchwardens, and the tower was repaired in a workmanlike manner.

The defendant was at first employed to do the plumber's work, and he was present on the tower, and gave directions to the carpenters how the wood-work of the gutters should be laid to receive the lead: the defendant did not, however, eventually do any part of the work.

At a vestry meeting held on the 11th of January, 1812, it was ordered, that a church rate should be made at 4*s.* in the pound, amounting in the whole to 807*l.* 14*s.* to reimburse to the said churchwardens the several sums of money by them expended in repairing *the said tower, and the other charges [*363 incident to their office.

Several of the parishioners appealed against this rate, and it was afterwards quashed in the Archdeacon's Court at Norwich.

Whilst the appeal was depending, the different tradesmen who had been employed, became urgent for the payment of their respective bills, and actions were brought against the plaintiff, who was thereby compelled to pay several bills to the amount of 505*l.* for the repairs of the said tower. The plaintiff being unable to obtain repayment of any part of the money he had expended, brought this action to recover one twentieth part of 505*l.* All the bills for the repair of the tower, which made up the sum of 505*l.*, were paid by the plaintiff to the different tradesmen employed more than six years before the commencement of the action, except a bill of 1*l.* 5*s.* which was paid subsequently.

It was admitted on the part of the plaintiff, that a moiety of the 505*l.* had been paid to him by Tricker.

The questions for the opinion of the court were, among others,

1st. Whether any cause of action existed against the defendant?

2nd. Whether, supposing the defendant liable, and the action well brought by the plaintiff alone, there was any sufficient evidence to take the case out of the statute of limitations?

Pell, Serjt., on the part of the plaintiff, after urging the hardship of his case, argued that the defendant had made himself a principal, and had become re-

*364] sponsible by giving directions to one of the carpenters employed. *As to the case of *Lanchester v. Tricker*,^(a) he impeached the accuracy of the report, because the court was made to say, that the parties who signed the resolution, had, in doing so, "acted only as vestrymen, without any intention of becoming *separately* liable;" whereas it never could have been argued or supposed that in signing the resolution jointly, each of them meant to become *separately* liable for the whole expense incurred.

BEST, C. J. This is an action for a contribution to defray charges which the defendant is alleged to have concurred in authorizing. In order to support such an action, there must be an express or an implied contract on the part of the defendant; but there is no express contract here, nor any ground to imply one. The counsel for the defendant thought it too strong to imply one from the circumstance of the defendant having been present at the vestry, and he therefore relied on the fact, that the defendant had given some directions to one of the carpenters. I am of opinion that this raises no such implication. It is *365] a hard case, but we must *not lay down a rule which may operate unjustly in other instances. If a man goes to a vestry to consult about church repairs, he has no intention of becoming individually responsible; few would attend vestry under such a responsibility; a responsibility which, if it existed, would work great injustice, inasmuch as it would subject a man who had but five pounds a year in the parish to the same burthens as a man who had a thousand, and would confine to those who were present at the meeting a burthen which ought to be rateably distributed among all the parishioners. The implication, therefore, which in general would arise from the giving of orders, is repelled by the circumstances of the present case, and the nature of a vestry meeting. The churchwardens who superintended the repairs would have been repaid if they had made a good prospective rate, and whatever they suffer has been occasioned by their own negligence. As to what passed between the defendant and the carpenter, it was in the way of instruction and raises no implication of a contract between him and the plaintiff.

PARK, J., concurred.

BURROUGH, J. The affairs of the church are purely of ecclesiastical cognisance; and every person in the parish is liable to contribute to the rate which the churchwardens have in their management: as churchwarden, the plaintiff had it in his power to indemnify himself by making a proper rate; but having neglected to do so, he cannot recover in this action. There may, indeed, be a special contract, which shall bind a party independently of the ecclesiastical authority, but no such contract has been made out in this case.

GASELER, J., concurring,

Judgment was given for the defendant.

(a) 1 Bingham, 202. The context shows obviously what was meant by the court and the reporter; and the word *separately*, it is submitted, is strictly appropriate. The passage stands thus: "The court thought that, in signing the resolution, they (the subscribers,) acted only as vestrymen, without any intention of becoming *separately* liable; that there could be no more reason for joining *them* in the action than *all the rest of the parishioners*."

Twenty of the parishioners had, as vestrymen, signed a resolution for the repairs of the church. The court thought, that in so signing, *those twenty* had no intention of becoming liable for the expense *separately* (or apart) from the rest of the parishioners: i. e. they had no intention that the twenty should be *separated* from the parishioners, and then divide the expense among the twenty; but their intention was, that the rest of the parishioners should be liable jointly with the twenty. The word *separately* is applied collectively to the whole twenty as distinguished from the rest of the parishioners, and not individually to each of the twenty, or with reference to one another.

*The KING v. The late Sheriff of MIDDLESEX, [366
in a Cause of

MARSHALL and Others v. FRANCIS.

Where the rule to bring in the body, served on the 5th July, expired on the second day of Michaelmas term: *Held*, that the sheriff was not discharged by the plaintiff's having, on the 7th of July preceding, and previously to the justification of bail, consented to an order to stay proceedings on payment of debt and costs within a month. *Dissentientibus Park and Burrough, Js.*

By the affidavits in this case it appeared that Francis was arrested on a capias, returnable in fifteen days of the Holy Trinity, 1824; that bail was put in to the action, and notice thereof served on the plaintiff's agents in due time; and notice of exception to such bail having been served on the defendant's attorney, he, on the 5th of July, gave notice that added bail would justify on the 7th.

On the 5th of July the plaintiff's attorney served a rule for the sheriff to bring in the body, which, as there were not four clear days remaining in Trinity term, did not expire till the second day of this term.

On the 6th of July the defendant's attorney took out a summons to show cause why the proceedings should not be stayed, on payment of debt and costs within a month; upon the back of which summons a consent was endorsed on behalf of the plaintiff's attorney, and in pursuance thereof, an order in the words following was obtained on the 7th of July, and served on the plaintiff's attorney on the 8th.

"Upon hearing the attorneys or agents on both sides, I do order, that, upon payment of 97l. 18s. 6d., the debt due from the defendant to the plaintiff, for which this action is brought, together with costs, to be taxed and paid within a month from the date of this order, all further proceedings in this cause be stayed.

"July 7th, 1824.

J. BURROUGH."

*Upon obtaining the order, the defendant's attorney, as is usual upon [367 such occasions, signed his name in the judge's book at chambers.

The defendant not having complied with the order, and not having given any new notice to add and justify bail, the plaintiff's attorney, on the 15th of November, sued out an attachment against the sheriff, and notice of render was served on the 17th.

Peake, Serjt., on the ground that, under the above circumstances, time had been given to the principal, and that the sheriff was discharged by the plaintiffs having secured to themselves a new remedy, obtained a rule nisi to set aside this attachment. He cited *Rex v. Sheriff of Surry*, 1 Taunt. 159, 7 T. R. 452; *West v. Ashdown*, 1 Bingh. 164, and *Rex v. Sheriff of London*, 1 Taunt. 111.

Vaughan, Serjt., for the plaintiffs, contended, that as the defendant had till the second day of this term to justify bail, the plaintiffs could take no step towards compelling payment in the interval, and that, therefore, the judge's order did not give any advantage that the parties were not possessed of before. The order was conditional, and the condition not being observed, amounted to nothing.

Best, C. J. I am of opinion, that the practice of the court in discharging the sheriff, under the idea of time having been given to the principal, has been carried much further than is expedient. However, I will overturn no case; and I am still ready to go as far as the authorities require. The cases which have been cited, however, are distinguishable from the present. In *Rex v. The Sheriff of London*, the party omitted to proceed against the sheriff within a reasonable time, but suffered himself to be amused with offers of compromise during two whole terms. In *Rex v. Sheriff of Surry*, time [368 was given under a cognovit to pay the debt by instalments; and *MANSFIELD*, C. J., says, "The effect of the instrument was, that from the time of giving it

the defendant could not be taken by the sheriff;" so that in that case the *cognovit* had changed the situation of the parties. Was the situation of the parties changed in the present case? On the judge's order there is no new undertaking that the defendant shall pay the debt, but it is a conditional order to stay proceedings on payment; so that under the order the plaintiff did not obtain any new remedy. But it is contended, the signature in the judge's book amounts to such an undertaking. That, however, is not an engagement on which an attachment could be issued, or even a rule to show cause why the attorney should not fulfil it. As the plaintiffs, therefore, have neither given the defendant time nor obtained any new remedy, I think this rule ought to be discharged. To make it absolute would operate with great hardship on defendants in general; for if once it is understood that the giving an order of this description deprives the plaintiff of his remedy against the sheriff, every indulgence will be refused to the defendant.

PARK, J. I feel great regret that the Court cannot be unanimous upon this occasion; but I think this order would be an absurdity, if, after it was signed, the plaintiff could take any step before the expiration of a month. It is true, that in *Fricker v. Eastman*, 11 East, 319, such an order was holden to be conditional; but it was there admitted, that it would be peremptory in this court. In the present case there is no surmise of fraud, and, by the undertaking entered in the judges' book, I am of opinion the plaintiff has obtained a new remedy, *369] on which he might proceed by attachment, or by coming to the court to compel the party signing it to fulfil his engagement. I think, therefore, the rule which has been obtained on the part of the defendant ought to be made absolute.

BURROUGH, J. The question is, whether the proceedings have been stayed for a month, for if they have the sheriff has a right to take advantage of that circumstance. I think they have been so stayed, and that till the month elapsed the plaintiffs could take no step. Then the undertaking in the judge's book, which is always given by the attorney or party on such an order as this, is an acknowledgment which the plaintiffs might come to the court to enforce. Inasmuch, therefore, as there has been delay in this case, and the plaintiffs have obtained a new remedy, I think the attachment ought not to have issued.

GASELER, J. To discharge the sheriff without sufficient reason would operate very mischievously in preventing the allowance of any indulgence to defendants. In the present instance the plaintiff could not take any further step till the second day of this term; so that in effect no time was given to the defendant; and as to the undertaking in the judge's book, it is not made part of the order, nor is there any case in which it has been holden, that an attachment would lie on such an undertaking, though the book, perhaps, would be a good memorandum of what had been done. It does not appear, therefore, that the plaintiffs have any new remedy, or that the sheriff has been in any way prejudiced. I agree, therefore, with my lord chief justice, that he ought not to be relieved from his responsibility.

On a subsequent day, BEST, C. J., said, that upon payment of costs, the Court would consent to make the rule

Absolute.

*370]

*CALTON v. PORTER.

If the person employed by the grantor of an annuity to raise money, and by the grantee to pay the consideration, retain any part of it for a debt due to himself from the grantor, and for the expenses of deeds, the court will set aside the annuity on payment of principal and interest, though the grantee is not privy to the retainer.

Vaughan, Serjt., obtained a rule nisi to set aside an annuity which had been granted by the defendant to the plaintiff.

The motion was made on the ground that part of the consideration-money had been retained, and was supported by an affidavit of the defendant, in which he stated,

That in 1814 he applied to Howard and Gibbs to raise him a sum of money by way of annuity, which they undertook to do, and it was agreed that the defendant should grant to some client of Howard and Gibbs a redeemable annuity of 105*l.* a year for the sum of 630*l.*, being at the rate of 16*l.* 13*s.* 4*d.* per cent. on the said purchase-money. That the defendant afterwards executed at Howard and Gibbs's office, a deed securing the annuity upon those terms, and a warrant of attorney to confess a judgment to the plaintiff.

That previously to executing the deed, he was indebted to Howard and Gibbs 90*l.* for money they had lent him: and

That Howard and Gibbs insisted on the payment of this 90*l.* out of the consideration-money for the annuity, together with 50*l.* for the charges of preparing the securities for the annuity.

That the defendant, fearing the annuity would not otherwise be carried into effect, submitted to return the said 90*l.* out of the said consideration-money, and paid to Howard and Gibbs the 50*l.* for preparing the securities.

That the defendant never saw the plaintiff during the *treaty for the annuity, which was wholly conducted by Howard and Gibbs. [*371]

Taddy, Serjt., who showed cause against the rule, relied on the circumstance of the plaintiff's not having been present at the time of the payment of the consideration-money; and that, therefore, he was not liable for tortious acts of Howard and Gibbs committed out of the scope of their authority: he contended further, that Howard and Gibbs were the defendant's agents, and that the retainer complained of might therefore be said to have been made with his own consent and authority: lastly, that the facts sworn to constituted a return, and not a retainer of the money, the offence complained of in the rule; he relied on *Mootham v. Howe*, 7 Taunt. 596, and *Movys v. Leake*, 8 T. R. 411, and used all the arguments which were urged in *Williamson v. Gould*, 1 Bingh. 234, and *Gorton v. Champneys*, id. 267. But he denied that those cases afforded any rule for the present, each of them having been decided on its own peculiar circumstances, and at all events he urged the court to reconsider them.

But the Court thought the last of those cases precisely in point with the present; they said it had been most solemnly argued and deliberately considered; that they were satisfied of the propriety of the decision; and that if they failed to adhere to it, they should in effect repeal the statute which regulated these annuity transactions. They therefore made the

Rule absolute upon payment of principal and interest.

*HEPPER v. MARSHAL and Others.

[*372]

Under the insolvent debtors' act, 1 G. 4, c. 119, by the assignment at the time of petition, the assignee takes only such property as the insolvent had at the time of the petition.

TRESPASS for taking goods. The plaintiff was an insolvent debtor, the defendant Marshal, his assignee. On the 20th of August, 1822, the plaintiff having petitioned the Insolvent Debtors' Court, and having assigned all his estate and effects to the provisional assignee, who assigned them to the defendant Marshal and another, was declared entitled to the benefit of the insolvent debtors' act, and was discharged from prison.

In November, 1822, by the assistance of his friends, he procured money, purchased furniture, wine, spirits, &c., and established himself in business as an innkeeper.

In May, 1823, he was at the instance of Marshal brought up before the Insolvent Debtors' Court for a rehearing, whereupon he was adjudged to be com-

mitted to the Fleet prison for twelve months, and the sentence of the court was carried into effect.

In December, 1823, Marshal, without having made any further application, or having taken any further proceedings in the Insolvent Debtors' Court, but acting on the assignment of 1822, authorized an auctioneer to seize all the goods which the insolvent had acquired subsequently to that assignment; to recover damages for which seizure this action was brought.

At the trial before HULLOCK, B., at the last Newcastle assizes, a verdict was found for the plaintiff, damages 125*l.*, with liberty for the defendant to move to set aside the verdict, and instead thereof enter a nonsuit.^(a)

*373] *Vaughan*, Serjt., accordingly obtained a rule nisi to this effect, on
the ground, that under the insolvent debtors' act, 1 G. 4, c. 119, the insolvent was not entitled "to the benefit of the act until his final discharge,
*374] and that all the property acquired up to that time passed to his assignee.

(a) By 1 G. 4, c. 119, s. 4, it is made "lawful for any person in that part of the United Kingdom called England, who shall be in actual custody upon any process whatsoever for or by reason of any debt, damage, costs, sum or sums of money, or for or by reason of any contempt of any court whatsoever for nonpayment of any sum or sums of money, or of costs taxed or untaxed, either ordered to be paid, or to the payment of which such persons would be liable in purging such contempt, or in any manner in consequence of or by reason of such contempt, at any time within the space of fourteen days next after such court shall have been so fully constituted and established, or within the space of fourteen days next after the commencement of such actual custody, or within such further time as the said court shall think reasonable, to apply by petition in a summary way to the court to be established by virtue of this act for his or her discharge from such confinement, according to the provisions of this act;" and it is further ordained by the same section, that "such prisoner shall, at the time of subscribing such petition, duly execute a conveyance and assignment, in such manner and form as the said court shall direct, of all the estate, right, title, interest, and trust of such prisoner to all the real and personal estate and effects of every such prisoner, except to the wearing apparel, bedding, and other such necessities of such prisoner, and his or her family, not exceeding in the whole the value of twenty pounds, so as to vest all such real and personal estate and effects in the provisional assignee of the said court, subject to a proviso, that in case such prisoner shall not obtain his discharge by virtue of this act, such conveyance and assignment shall, from and after the dismissal of the petition of such prisoner praying for his discharge, be null and void to all intents and purposes."

By sect. 6 it is "further enacted that such prisoner shall, within the space of fourteen days next after such petition shall have been filed, or within such further time as the said court shall think reasonable, deliver into the said court a schedule, containing, among other things, a full, true, and perfect account of all the estates and effects, real and personal, in possession, reversion, remainder, or expectancy, &c., which such prisoner, or any other person or persons in trust for such prisoner, or for his or her use, benefit, or advantage in any manner whatsoever, shall be seized or possessed of, or interested in or entitled unto, or which such prisoner, or any person or persons in trust for him or her, or for his or her benefit, shall have any power to dispose of, charge, or exercise for the benefit or advantage of such prisoner at the time of presenting such petition."

And by sect. 25 it is "further enacted, that when any order for the discharge of any prisoner shall be made, the said court may also order that a judgment shall be entered up against such prisoner in some one of the superior courts of Westminster, in the name of the assignee or assignees of such prisoner, or of such provisional assignee as aforesaid, if no other assignee shall then have been appointed and shall have accepted such office, for the amount of the debts of such prisoner which shall at the time of such order remain due and unpaid to the said creditors, and from which such prisoner shall be discharged by such order; and the said prisoner shall execute a warrant of attorney to authorize the entering up such judgment, and such judgment shall have the force of a recognisance, and such order of the court, to be established by virtue of this act, shall be a sufficient authority to the proper officer for entering up such judgment; and when it shall appear to the satisfaction of the said court that such prisoner is of ability to pay such debts or any part thereof, or that he is dead, leaving assets for that purpose, the court may permit execution to be taken out upon such judgment, or put in force any other power given by this act against the property acquired by such prisoner after his discharge, for such sum of money as, under all the circumstances of such prisoner, the court shall order: such sum to be distributed rateably amongst the creditors; and such further proceedings shall and may be had, according to the discretion of the court, from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as such court shall think fit to award; and no scire facias shall be necessary to revive such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the said court. Provided always that, in case any such application against such prisoner shall appear to the court to be ill-founded and vexatious, it shall be lawful for the court, not only to refuse to make any order on such application, but also to dismiss the same, with such costs as to the court shall appear reasonable."

Wilde, Serjt., who showed cause, relied on the clear language of the fourth and sixth sections of the act, by the first of which the prisoner is bound *at the time of subscribing his petition*, not at the time of his discharge, to execute an assignment of all his estate and effects, and by the latter, to deliver in a schedule of all the *property he possessed *at the time of presenting his petition*. He also urged that the twenty-fifth section rendered it still [*375 more clear, that nothing passed by the assignment but such property as the insolvent possessed at the time of executing it; inasmuch as a particular course was pointed out in that section by which the assignee might possess himself of subsequently acquired property; but that course not having been pursued by the defendant, the verdict against him must stand. The assignees of a bankrupt took, by the assignment, the bankrupt's subsequently acquired property, but that was under the provisions of a particular statute, which did not affect insolvents.

Vaughan, in support of his rule, contended that the provisions of the 25th section applied only to property acquired subsequently to the insolvent's final discharge, and that it would defeat the intention of the legislature, if the assignee did not take every thing that belonged to the bankrupt up to that period. The assignment at the time of the petition was made to a provisional assignee, and did not affect the subsequent conveyance to the general assignee, which might be postponed even to the time of the final discharge; and by section 17th, where an insolvent had, as in the present instance, acted fraudulently, that discharge might not take place till three years after the petition.

BEST, C. J. At the time this rule was granted, I had no doubt what would be its ultimate fate; but as the act for the relief of insolvent debtors is an act of great importance, and as the question which has been discussed is rather of an extensive nature, we thought it fit that the point should be considered. Under the common law, a creditor cannot get possession of the property of the debtor except by a writ of execution; the *defendants, therefore, must [*376 show that the assignees of an insolvent debtor have his property vested in them by the statute. But we have looked through the act, and can find no clause which vests in the assignees property acquired subsequently to the execution of the assignment by the insolvent. The conveyance authorized by the 4th section, only transfers the property the insolvent had at the time of the petition, and there is nowhere in the statute such a provision as is to be found in the 13th of Eliz. with respect to bankrupts, transferring to their assignees all such personal property as shall come to the bankrupt. By the 6th section, the insolvent is required to give in a schedule of all property which he possesses at the time of presenting his petition, but there is no distinction, as has been supposed in argument, between the conveyance to the provisional and the permanent assignee. The 7th section enacts, that when the permanent assignee shall have accepted the appointment, the prisoner's "estate, effects, rights, and powers vested in such provisional assignee as aforesaid, shall immediately be assigned by such provisional assignee" to the permanent assignee; so that the latter takes no more than was vested in the former. The 17th section, which gives the commissioners the power of punishing the insolvent for fraud, does not in any way affect his after acquired property; the principal difference between the two systems of law is, that the assignees of a bankrupt are trusted with a power over his future effects without further resort to the commissioners,—but the assignees of an insolvent must apply to the Insolvent Debtors' Court, who have authority to direct judgment to be entered, and execution issued against property subsequently acquired. The insolvent court is, however, to take care that new creditors, who have furnished the means of acquiring subsequent property, shall be first paid: but if this defence can be *sustained, the assignees would seize for the benefit of the old creditors, and [*377 they who furnished the subsequently acquired property would get nothing.

PARK, J., and *BURROUGH*, J., concurred.

GASELEE, J. The language of the 4th, 6th, and 7th sections is so unequivocal, that no doubt can be raised by any of the subsequent provisions of the statute. The permanent assignee takes the same interest in the insolvent's property as the provisional assignee, and the provisional assignee takes only what the insolvent had at the time of subscribing his petition. Property subsequently acquired, may be obtained under the warrant of attorney and judgment, on which the court is authorized to issue execution. But the defendant not having had recourse to any such judgment, the rule which he has obtained must be

Discharged.

STAFFORD and Another, Assignees of CLARK the Younger, v. CLARK the Elder.

Under the general issue in assumpsit, a judgment recovered for the same cause of action may be given in evidence. The payment of money into court on several general counts, one of which only is applicable to the plaintiffs' demand, admits a cause of action on that count only.

In Trinity term, 1823, the plaintiffs brought an action of trover against the defendant, in which action they sought to recover (among other things) damages for the conversion of two bills of exchange. They obtained upon the trial of this cause a verdict for 72*l*.

In Hilary term last, the plaintiffs brought an action of assumpsit against the defendant for goods sold and delivered, money lent, paid, had and received, and upon an account stated. The defendant pleaded the general issue, and paid 5*l*. into court on three of the counts in the declaration, one of them being the count for money had and received.

Upon the trial of this action at the Middlesex sittings after last Trinity term, before **BEST, C. J.**, the plaintiffs sought to recover the amount of two bills of exchange which the bankrupt had endorsed to the defendant, being the same bills of exchange for the conversion of which they sought to recover damages in the action of trover. The defendant then gave the office copy of the judgment in the first action in evidence, as a bar to the plaintiffs recovering the amount of those two bills of exchange; this evidence was objected to by the plaintiffs' counsel, upon the ground that the judgment ought to have been pleaded; which objection was overruled by the judge, and the judgment was allowed to be given in evidence, in consequence of which the plaintiffs, being able to prove nothing but an admission of the defendant that 30*s*. of the bankrupt's money had come to his hand, obtained a verdict for 30*s*. only upon the 5th count, for money had and received, with liberty for the defendant to move to enter a nonsuit.

This term, **Pell, Serjt.**, on the part of the plaintiffs, obtained a rule nisi to increase the damages to 39*l*. 10*s*. or to have a new trial, on the ground that the office copy of the judgment ought not to have been received in evidence, but that the judgment should have been pleaded; and **Vaughan, Serjt.**, on the part of the defendant, obtained a rule nisi to enter a nonsuit.

The two rules were now discussed together.

Pell. The judgment ought not to have been received in evidence under the general issue. There are two species of trial; one, per pais, the other, per recordum; *to the latter the judges alone are competent, as the lay gents' are unable to understand the true effect of the record; and yet, if the judgment were produced to the jury as a conclusive answer to the plaintiffs' demand, the jury would be called on to pronounce an opinion on the effect and import of a record. In *Vooght v. Winch*, 2 B. & A. 668, **ABBOTT, C. J.**, says, "I am aware, that in *Bird v. Randal*, Lord MANSFIELD is reported to have said, that a former recovery need not be pleaded, but will be a bar when given in evidence. I cannot, however, accede to that, for the very first thing I learnt in the study of the law, was, that a judgment recovered must be plead

Wilde, Serjt., who showed cause, relied on the clear language of the fourth and sixth sections of the act, by the first of which the prisoner is bound at the time of subscribing his petition, not at the time of his discharge, to execute an assignment of all his estate and effects, and by the latter, to deliver in a schedule of all the *property he possessed at the time of presenting his petition. He also urged that the twenty-fifth section rendered it still [*376 more clear, that nothing passed by the assignment but such property as the insolvent possessed at the time of executing it; inasmuch as a particular course was pointed out in that section by which the assignee might possess himself of subsequently acquired property; but that course not having been pursued by the defendant, the verdict against him must stand. The assignees of a bankrupt took, by the assignment, the bankrupt's subsequently acquired property, but that was under the provisions of a particular statute, which did not affect insolvents.

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Pell. The judgment ought not to have been received in evidence under the general issue. There are two species of trial; one, per pais, the other, per recordum; *to the latter the judges alone are competent, as the lay gents' are unable to understand the true effect of the record; and yet, if the judgment were produced to the jury as a conclusive answer to the plaintiffs' demand, the jury would be called on to pronounce an opinion on the effect and import of a record. In *Vooght v. Winch*, 2 B. & A. 668, ABBOTT, C. J., says, "I am aware, that in *Bird v. Randal*, Lord MANSFIELD is reported to have said, that a former recovery need not be pleaded, but will be a bar when given in evidence. I cannot, however, accede to that, for the very first thing I learnt in the study of the law, was, that a judgment recovered must be plead

Wilde, Serjt., who showed cause, relied on the clear language of the fourth and sixth sections of the act, by the first of which the prisoner is bound *at the time of subscribing his petition*, not at the time of his discharge, to execute an assignment of all his estate and effects, and by the latter, to deliver in a schedule of all the *property he possessed *at the time of presenting his petition*. He also urged that the twenty-fifth section rendered it still [*375 more clear, that nothing passed by the assignment but such property as the insolvent possessed at the time of executing it; inasmuch as a particular course was pointed out in that section by which the assignee might possess himself of subsequently acquired property; but that course not having been pursued by the defendant, the verdict against him must stand. The assignees of a bankrupt took, by the assignment, the bankrupt's subsequently acquired property, but that was under the provisions of a particular statute, which did not affect insolvents.

Vaughan, in support of his rule, contended that the provisions of the 25th section applied only to property acquired subsequently to the insolvent's final discharge, and that it would defeat the intention of the legislature, if the assignee did not take every thing that belonged to the bankrupt up to that period. The assignment at the time of the petition was made to a provisional assignee, and did not affect the subsequent conveyance to the general assignee, which might be postponed even to the time of the final discharge; and by section 17th, where an insolvent had, as in the present instance, acted fraudulently, that discharge might not take place till three years after the petition.

Best, C. J. At the time this rule was granted, I had no doubt what would be its ultimate fate; but as the act for the relief of insolvent debtors is an act of great importance, and as the question which has been discussed is rather of an extensive nature, we thought it fit that the point should be considered. Under the common law, a creditor cannot get possession of the property of the debtor except by a writ of execution; the *defendants, therefore, must [*376 show that the assignees of an insolvent debtor have his property vested in them by the statute. But we have looked through the act, and can find no clause which vests in the assignees property acquired subsequently to the execution of the assignment by the insolvent. The conveyance authorized by the 4th section, only transfers the property the insolvent had at the time of the petition, and there is nowhere in the statute such a provision as is to be found in the 13th of Eliz. with respect to bankrupts, transferring to their assignees all such personal property as shall come to the bankrupt. By the 6th section, the insolvent is required to give in a schedule of all property which he possesses at the time of presenting his petition, but there is no distinction, as has been supposed in argument, between the conveyance to the provisional and the permanent assignee. The 7th section enacts, that when the permanent assignee shall have accepted the appointment, the prisoner's "estate, effects, rights, and powers vested in such provisional assignee as aforesaid, shall immediately be assigned by such provisional assignee" to the permanent assignee; so that the latter takes no more than was vested in the former. The 17th section, which gives the commissioners the power of punishing the insolvent for fraud, does not in any way affect his after acquired property; the principal difference between the two systems of law is, that the assignees of a bankrupt are trusted with a power over his future effects without further resort to the commissioners,—but the assignees of an insolvent must apply to the Insolvent Debtors' Court, who have authority to direct judgment to be entered, and execution issued against property subsequently acquired. The insolvent court is, however, to take care that new creditors, who have furnished the means of acquiring subsequent property, shall be first paid: but if this defence can be *sustained, the assignees would seize for the benefit of the old creditors, and [*377 they who furnished the subsequently acquired property would get nothing.

PARK, J., and *BURROUGH*, J., concurred.

GASELEE, J. The language of the 4th, 6th, and 7th sections is so unequivocal, that no doubt can be raised by any of the subsequent provisions of the statute. The permanent assignee takes the same interest in the insolvent's property as the provisional assignee, and the provisional assignee takes only what the insolvent had at the time of subscribing his petition. Property subsequently acquired, may be obtained under the warrant of attorney and judgment, on which the court is authorized to issue execution. But the defendant not having had recourse to any such judgment, the rule which he has obtained must be

Discharged.

STAFFORD and Another, Assignees of CLARK the Younger, v. CLARK the Elder.

Under the general issue in assumpsit, a judgment recovered for the same cause of action may be given in evidence. The payment of money into court on several general counts, one of which only is applicable to the plaintiffs' demand, admits a cause of action on that count only.

In Trinity term, 1823, the plaintiffs brought an action of trover against the defendant, in which action they sought to recover (among other things) damages for the conversion of two bills of exchange. They obtained upon the trial of this cause a verdict for 72*l.*

In Hilary term last, the plaintiffs brought an action of assumpsit against the defendant for goods sold and delivered, money lent, paid, had and received, and upon an account stated. The defendant pleaded the general issue, and paid 5*l.* into court on three of the counts in the declaration, one of them being the count for money had and received.

Upon the trial of this action at the Middlesex sittings after last Trinity term, before **Best, C. J.**, the plaintiffs sought to recover the amount of two bills of exchange which the bankrupt had endorsed to the defendant, being the same bills of exchange for the conversion of which they sought to recover damages in the action of trover. The defendant then gave the office copy of the judgment in the first action in evidence, as a bar to the plaintiffs recovering the amount of those two bills of exchange; this evidence was objected to by the plaintiffs' counsel, upon the ground that the judgment ought to have been pleaded; which objection was overruled by the judge, and the judgment was allowed to be given in evidence, in consequence of which the plaintiffs, being able to prove nothing but an admission of the defendant that 30*s.* of the bankrupt's money had come to his hand, obtained a verdict for 30*s.* only upon the 5th count, for money had and received, with liberty for the defendant to move to enter a nonsuit.

This term, **Pell, Serjt.**, on the part of the plaintiffs, obtained a rule nisi to increase the damages to 39*l.* 10*s.* or to have a new trial, on the ground that the office copy of the judgment ought not to have been received in evidence, but that the judgment should have been pleaded; and **Vaughan, Serjt.**, on the part of the defendant, obtained a rule nisi to enter a nonsuit.

The two rules were now discussed together.

Pell. The judgment ought not to have been received in evidence under the general issue. There are two species of trial; one, per pais, the other, per recordum: *to the latter the judges alone are competent, as the lay gents' are unable to understand the true effect of the record; and yet, if the judgment were produced to the jury as a conclusive answer to the plaintiffs' demand, the jury would be called on to pronounce an opinion on the effect and import of a record. In *Vooght v. Winch*, 2 B. & A. 668, **ABBOTT, C. J.**, says, "I am aware, that in *Bird v. Randal*, Lord MANSFIELD is reported to have said, that a former recovery need not be pleaded, but will be a bar when given in evidence. I cannot, however, accede to that, for the very first thing I learnt in the study of the law, was, that a judgment recovered must be plead

ed : that has so strongly engrafted itself on my mind as a general principle, that nothing I have heard in argument has shaken it." With respect to the rule to enter a nonsuit, the payment of money into court, on three counts, admits that something is due on each : the evidence at the trial applied only to one ; and the plaintiff is entitled to a verdict on the other two.

Vaughan and Cross, Serjts., for the defendant. The judgment was receivable in evidence, and conclusive against the plaintiff.

First, it was receivable :

The result of the numerous cases is, that a judgment when pleaded, is a bar,—an estoppel:—when produced in evidence, is sufficient to defeat the claim of the party against whom it is adduced, if the evidence in the second action is the same as would have supported the first. *Outram v. Morewood*, 3 East, 345 ; *Duchess of Kingston's case*, 11 St. Tr. 261 ; *Burrows v. Jemino*, 1 Str. 733 ; *Hitchin v. Campbell*, 3 Wils. 304. Even in *Vooght v. Winch* the judgment was received in evidence, and the only question [*380 was as to its conclusiveness. Indeed the principle is universally recognised, that under non-assumpsit the defendant may give in evidence any thing which shows that the plaintiff had not, at the commencement of the suit, a valid subsisting cause of action : *Moses v. M'Farlan*, 2 Burr. 1012 : as payment, 1 Ld. Raym. 217 ; foreign attachment, 1 Salk. 280. 291 ; accord and satisfaction, 1 Ld. Raym. 566 ; arbitrament, Ld. Raym. 1022 ; or a release, Doug. 106, 3 Esp. 234. *Trevivan v. Lawrence*, Salk. 276, is the only case that gives any ground for saying, that a defendant who has omitted to plead a judgment has thereby made his election, and that the jury are not bound by estoppel. But the estoppel there spoken of is only that which is strictly called an estoppel ; that is, by act of the party ; and the point is fully explained in *Rawlins's case*, 4 Rep. 52.

Secondly, If admitted, the judgment is conclusive. In the *Duchess of Kingston's case* this is expressly laid down by DE GREY, J. Lord MANSFIELD's language in *Bird v. Randal*, 3 Burr. 1353, is to the same effect ; and in *Geyer v. Aguilar*, 7 T. R. 681, the sentence of a foreign court was deemed conclusive against underwriters. [The Court here intimated that they were satisfied on this point.] The payment of money into court on several general counts, one of which only is applicable to the plaintiffs' demand, admits a cause of action on that count only.

Pell. In none of the cases cited does it expressly appear that the judgment of a superior court has been given in evidence under the general issue. If it is pleaded, the plaintiff may reply, as in *Seddon v. Tytop*, 6 T. R. 607, that the promises in the second action are not the identical *promises on [*381 which judgment was recovered in the first ; but unless it be pleaded he may be altogether taken by surprise. The expressions of ABBOTT, C. J., in *Vooght v. Winch* are unqualified ; and that is the latest authority on the point.

PARK, J. I am of opinion that a nonsuit ought to be entered, and that the copy of the judgment was properly received in evidence. That a record is admissible in evidence before a jury, I have no doubt ; and if we hold otherwise we must oppose all the cases which have been decided on the subject. If, indeed, the party wishes that it should operate as a bar to the action, he must plead it ; but when he omits to do this, he may give it in evidence under the general issue. I do not enter into the question of the conclusiveness of such a document when it is produced in evidence : Lord MANSFIELD thought it conclusive, but my Lord Chief Justice ABBOTT seems to consider it otherwise : upon that point, therefore, I abstain from giving any opinion ; but as to its admissibility in evidence, I entertain no doubt. It must, however, be shown to relate to the same parties and the same subject-matter ; and in determining this, the jury will not take more upon themselves than they might be called on to do if the judgment were pleaded in bar, and the plaintiff were to reply that it

did not relate to the same matters as the action in which it is pleaded. The record, therefore, is not put in for the jury to try its validity, but merely as a circumstance from which they may infer that the plaintiff's claim has been satisfied. The sum which the defendant is alleged to have received on the bankrupt's account being covered by the money paid into court, the rule for entering a nonsuit must be made absolute.

*382] **BURROUGH, J.**, concurred as to the admissibility of the judgment in evidence, though not as conclusive of itself; and observed on the mischievous consequences of allowing a plaintiff to maintain more than one suit for the same cause of action.

GASELEE, J. The only point on which I shall deliver any opinion is, as to the admissibility of the record in evidence on the general issue; upon the question of conclusiveness I do not think it necessary to enter. Now there is not a single case which decides that a record is inadmissible in evidence before a jury; and the only authority that looks that way, is the language of Lord Chief Justice **ABBOTT** in *Vooght v. Winch*; but, taking the whole judgment together, all his lordship seems to have meant is, that in order to render the judgment a conclusive bar to the action, it must be pleaded.

BEST, C. J. I had never any doubt, but that if a plaintiff having several causes of action against a defendant on a trial offers evidence on those causes, and fails for want of sufficient evidence to establish some of them, he cannot bring another action for those causes of action on which he failed. If plaintiffs were permitted to repeat those attempts to recover the same demand, they might increase costs against a defendant to a ruinous extent. Wherever a plaintiff fails to recover all that he is entitled to for want of sufficient proof on the first trial, he should move to set aside the verdict that he has obtained, and then the court takes care that he shall pay the costs of the first trial, so that the defendant may not suffer from the plaintiff's not being prepared at that trial. This was the course pursued in *Hall v. Stone*, 1 Str. 515, and *Markham v. Middleton*, 2

*383] Str. 1259. In consequence of what was said by Lord C. J. **ABBOTT** in *Vooght v. Winch*, I doubted whether the defendant could set up this defence on the general issue: but *Bird v. Randal* and *Burrows v. Jemino* have entirely removed that doubt. Whatever puts an end to the plaintiff's cause of action may be given in evidence on the plea of non-assumpsit. The defendant, it appeared, had acknowledged that he had received thirty shillings from the bankrupt, and which thirty shillings was not sought to be recovered in the present cause. He had paid into court five pounds on three counts. The thirty shillings was recoverable under one of these counts *only*. It was insisted by the plaintiff's counsel, that payment of money into court admitted that something was due on each of the counts on which it was paid in, and, therefore, that he must have a verdict on two of the three counts. As there is much confusion in the cases respecting the effect of paying money into court, I allowed plaintiff to take a verdict for the thirty shillings, and gave defendant leave to move to enter a nonsuit. I am of opinion that the payment of the money into court on several general counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only. The sum paid in, exceeding plaintiff's demand on the count that applied to it, the defendant's rule for a nonsuit must be made absolute, and the plaintiff's rule for adding the sum sought to be recovered in the former action to the thirty shillings must be

Discharged.

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***REEDER v. BLOOM.**

Where it is not inconsistent with the justice of the case, the court will, after verdict, amend the record by the insertion of a similiter.

TRESPASS for assault and battery. Pleas, first, general issue; second and
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fifth, son assault demesne; third and fourth, that plaintiff invaded the defendant's pew, and that he necessarily resisted her in defence of his exclusive possession thereof.

Replication. As to the first plea whereof the defendant hath put himself upon the country, the plaintiff doth the like. As to the second, third, fourth, and fifth, de injuria sua propria; concluding, "and this the said plaintiff prays may be inquired of by the country, &c.;" then, without any similiter, the issue roll proceeded, "therefore, as well to try this issue as the said other issues between the parties aforesaid, the sheriff is commanded that he cause to come herein twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., because as well, &c."

At the trial of the cause at the last Norwich assizes, before the lord chief baron, a verdict was found for the plaintiff, damages one shilling, and the judge did not certify.

Wilde, Serjt., obtained a rule nisi to enter up the verdict on the general issue only, or set aside the verdict as irregular for want of a similiter; and

Cross, Serjt., obtained a rule nisi to amend the nisi prius record by adding the similiter.

The two rules now came on to be heard together.

*On the part of the defendant, *Griffith v. Crockford*, 3 B. & B. 1, 6 B. M. 51, and *Ferrers v. Weall*, 2 B. M. 215, were cited, and it was [*385 urged that both parties being to blame, no injustice would be done by granting the defendant's application to confine the verdict to the general issue.

For the plaintiff, *Sayer v. Pocock*, Cowp. 407, was relied on.

BEST, C. J. It is in the discretion of the court whether or no they will allow the amendment which has been prayed. Now a defendant who puts upon the record pleas which he is unable to prove, ought to pay the costs which he occasions to the other party by increasing the number of points on which he must come prepared at the trial. But we are told that we ought not to make the present defendant, who stands in this situation, pay costs, because there is on the record the omission of a similiter. In answer to this, the case of *Sayer v. Pocock* has been cited, which we find it impossible to distinguish from the present. It has been urged, however, that there are two decisions in this court which are at variance with the former. First, *Ferrers v. Weall*. That is a very different case from the present; the party there did not pray merely to fill up an etc. and add a similiter, but also to insert a traverse, and this after the defect had been pointed out to him previously to the trial. Then, in *Griffith v. Crockford*, according to the report in Moore, the record was sent to the attorney, and he was called on before trial to amend, but refused. That case, therefore, is also distinguishable from the present. As far then as authority goes, we are warranted in permitting the amendment, and in justice we ought to do so.

*PARK, J., and BURROUGH, J., concurred.

GASELEE, J. An amendment similar to that now prayed, was per- [*386 mitted in *Grundy v. Mell*, 1 N. R. 28, as well as in *Sayer v. Pocock*, and according to 2 Wms. Saunders, 319, n. 6, the defect is one which may be remedied at any time.

The plaintiff's rule, therefore, must be made absolute, and the defendant's
Discharged.

FLOYD, Demandant; SIMMONS, Tenant.

Fine.—Amendment.

THE fine was levied in 1768, and in the deed to lead to uses the property was described as four-fifths of certain premises in the parish of Eynsford. In the fine it was described to be in Dartford, which is a few miles distant from Eynsford.

Upon an affidavit from an attorney of Dartford, that he was acquainted with most of the titles in the place; that he had searched the parochial books, and had made every possible inquiry; that no one who knew the parties to the fine ever heard of their having any property in Dartford, and that the deponent believed they never had,

The Court, on the motion of *Pell*, Serjt., permitted the word Dartford to be erased, and the word Eynsford to be substituted for it on the fine.

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***DENMAN v. BULL.**

Costs allowed on an interlocutory proceeding in a writ of entry.

Pell, Serjt., moved for a rule to show cause why the prothonotary should not review his taxation, he having allowed costs on an interlocutory proceeding in a writ of entry, a writ on which no statute had made any provision for costs.

But the Court said it had always been usual to allow costs in such proceedings; as on applications to amend, and the like; and that costs on interlocutory proceedings in general rested on the discretion of the court, the statute of Gloucester only providing for final judgment.

Rule refused.

GALLEY v. BARRINGTON and Others.

Settlement to the use of J. G. for life, remainder to the use of the first son of the body of J. G. by A. S., his intended wife; and for default of such issue, to the use of the second, third, and other sons of the body of J. G. by A. S., severally and successively as they shall be in seniority of age, and of the several heirs male of their several bodies; and for default of such issue, then in case A. S. should be enceinte by J. G., to the use of J. P. till A. S. should be delivered, in trust for after-born child or children; and in case such should be a son or sons, to the use of such after-born son and sons severally and successively as they should be in priority of birth, and the heirs male of the body and bodies of such after-born son and sons:

Held, that the first son of J. G. by A. S., born during his life, took an estate tail.

THE following case was directed by the vice-chancellor to be sent for the opinion of the Court of Common Pleas:

*388] *By certain indentures of lease and release, bearing date respectively the 22d and 23d of May, 1738, being the settlement made upon the marriage of John Galley and Ann his wife, both deceased, (the release being of four parts, and made between Tamar Galley, widow, Daniel Galley, and Ellen his wife, and John Galley, son and heir apparent of Daniel Galley of the first part, Thomas Podmore of the second part, Moses Steele of the third part, and Ann Steele, spinster, daughter of Moses Steele of the fourth part,) it was witnessed, that in consideration of a marriage then shortly to be had and solemnized between John Galley and Ann Steele, and of a competent portion of the said Ann Steele, accruing to the said John Galley, they, T. Galley, D. Galley, and Ellen his wife, and J. Galley, did, and each and every of them did grant, release, and confirm unto T. Podmore, his heirs and assigns, a certain messuage or tenement in Arclid, in the county of Chester, and certain lands, tenements, messuages, hereditaments, and premises therein particularized, being the messuage or tenement, land, and tithes at present in question, to hold the same unto T. Podmore, his heirs and assigns, to the use of Moses Steele, his executors, administrators, and assigns, for a term of 99 years, upon certain trusts, which have long since determined, with remainder to the use of J. Galley and his assigns for life, without impeachment of waste, with remainder to T. Podmore, in trust to preserve the contingent remainders, with remainder to the use of M. Steele, his executors, administrators, and assigns, for a term of 99 years, upon certain trusts, which have also ceased and determined, and subject thereto to M. Steele, his executors, &c., for a term of 200 years, upon.

trust, to raise the sum of 200*l.* for the younger children of the said marriage, and which has also determined; and subject thereto, to the use of the first son of the body of J. Galley upon the body of the said Ann Steele, *his intended wife, lawfully to be begotten; and for default of such issue, then [*389 to the use and behoof of the second, third, fourth, fifth, and all and every other the son and sons of J. Galley on the body of A. Steele lawfully to be begotten, severally and successively one after another in order and course as they shall be in seniority of age and priority of birth, and of the several heirs male of *their* several and respective bodies lawfully to be begotten; the elder of such sons, and the heirs male of his body, being always preferred before the younger, and the heirs male of his and their body and bodies. And for default of such issue, then in case A. Steele should happen to be enceinte with child or children by J. Galley at the time of his death, then to the use of T. Podmore, and his heirs, until A. Steele should be of such child or children delivered, or die, in trust for such after-born child or children; and if such after-born child or children should happen to be a son or sons, then to the use of such after-born son and sons severally and successively as they should be in priority of birth, and the heirs male of the body and bodies of such after-born son and sons, the elder, and the heirs male of his body, being preferred before the younger of them, and the heirs male of his and their body and bodies; and for default of such issue, with remainder to the use of all and every the daughter and daughters of J. Galley upon the body of A. Steele lawfully to be begotten, and their several and respective heirs, share and share alike; and for default of such issue, with remainder to the use of J. Galley, his heirs and assigns for ever.

J. Galley and A. Steele afterwards intermarried, and J. Galley died on or about the 12th of April, 1791, and left J. Galley, since deceased, his eldest son of that marriage, and several younger children.

The question for the opinion of the court was this, What estate did J. Galley, the eldest son of J. Galley, *the settlor, take under the limitations in [*390 the marriage settlement of the 23d of May, 1738?

Bosanquet, Serjt., for the plaintiff. John Galley, the son, took an estate for life only. Whatever the supposed situation of the settlor may be, no estate of inheritance can pass under a deed unless words of inheritance are employed. *Lord Paget v. Ashton*, 1 Leon. 2; *Gough v. Howarde*, 3 Bulstr. 127. And there is no difference in this respect between a deed to uses and any other deed. *Tanner v. Merlott*, Willes, 177; *Doe v. Morgan*, 3 T. R. 765, per KENYON, C. J.; *Alpass v. Watkins*, 8 T. R. 519, per KENYON, C. J. In the present case the limitation is "to the use of the first son of the body of J. Galley upon the body of A. S., his intended wife, lawfully to be begotten; and for default of *such* issue, then to the use of the second, third, fourth, fifth, and all and every other the son and sons of J. G., on the body of A. S. lawfully to be begotten, severally and successively one after another in seniority of age, and of the several heirs male of *their* several and repective bodies." So that though estates of inheritance are limited to the second and other sons, the first can only take an estate for life. The expression, "*for default of such issue*," must be taken to mean for default of such first son, for there is no other antecedent to which the word *such* can apply. *Hay v. Lord Coventry*, 3 T. R. 83; *Denn d. Briddon v. Page*, 3 T. R. 87; *Doe d. Comberbach v. Perryn*, 3 T. R. 484. In *Evans v. Astley*, 3 Burr. 1570, indeed, there is a dictum the other way; but that was a case of a will, and there was an antecedent to which the word might be distinctly applied. That was likewise the case in *Doe v. Martin*, 4 T. R. 39, where there was also a power of *jointuring; and in *Owen v. Smith*, 2 H. Bl. 594, there were several clauses in the deed which [*391 recognised the first son as tenant in tail, and then the expression was, "all and ever *such* son and sons *respectively* issuing." But if in the present case the relative *they*, in the sentence "as *they* shall be in priority of birth," can only

apply to the second and other sons, it is impossible to apply the relative *their*, in the sentence "and the issue of their bodies," to any other antecedent.

Peake, Serjt., for the defendant. There can be no doubt the intention of the settlor was to give an estate of inheritance to the first, as well as the other sons, and that the omission of the word *heirs* is only a slip. To hold otherwise were to suppose him actuated by the most absurd caprice, such as to give the elder son an estate tail if he were born a single day after his father's death, but only an estate for life if born a day before. Now in all deeds where any obscurity arises, if the court can clearly see on the face of the whole deed, taken together, that the intention of the party is different from what it appears in a single sentence, the court will take their construction from the four corners of the deed. In *Hay v. Lord Coventry*, and in 8 T. R. 116, Lord KENYON says, "*Noscitur a sociis*;" that is, one provision must be construed by the bearing it will have upon another: the limitation, therefore, by which the settlor gives a posthumous son an estate tail, affords a strong indication that he would not have restricted him to an estate for life, merely because he might have been born a few hours sooner. The word "*such*" is not necessarily confined to the last antecedent, as appears by the case of *Owen v. Smith*, which is expressly in point for the defendant; and according to Com. Dig. **Parols*,

*392] A. 14, relative words are only referred to the next antecedent where there is no intention apparent to the contrary.

Bosanquet, in reply, urged that the rule of construction proposed on the part of the defendant would introduce into titles depending on deeds all the confusion and uncertainty attending titles depending on wills, and it was notorious, that the courts had long regretted, in consequence of this confusion, that wills had not originally been subjected to the same rules of construction as were applied to deeds.

The following certificate was afterwards sent.

This case has been argued before us. We have considered the same, and are of opinion that John Galley, the eldest son of John Galley the settlor, took an estate tail under the limitations in the marriage settlement of the 23d of May, 1738.

W. D. BEST,
J. A. PARK,
J. BURROUGH,
S. GASELEE.

*393] DAVIS v. The Governor and Company of the Bank of ENGLAND.

Held, that a party might recover from the Bank of England the dividends arising on his stock in the funds, though at the time the dividends were payable he knew the stock had some months previously been placed, under a forged power of attorney, to the name of another person; omitted to inform the Bank of the circumstance; and did not demand payment of the dividends till after the escape of the offender.

Property in stock is not transferred from the owner by being placed, under a forged power of attorney, to the name of another person in the books of the Bank of England.

THIS was a special action on the case, for breach of duty, in permitting a transfer of the plaintiff's stock without his authority, and for refusing to pay him the dividends thereon. The first count of the declaration stated, that the plaintiff was entitled to 10,000*l.* 3 per cent. consolidated annuities standing in his name in the books of the defendants, and that the defendants, contrary to their duty, permitted this stock to be transferred out of the plaintiff's name without his authority, by which the plaintiff had lost the stock, and all benefits and advantages that he would have acquired if such stock had continued in his name. The third count was like the first, except that it complained of 75*l.*, part of 178*l.* long annuities belonging to the plaintiff, being permitted by the

defendants to be transferred out of his name without his authority. The second count stated, that the plaintiff was possessed of the consolidated annuities mentioned in the first count, and that he had authorized no transfer of this property, and yet the defendants refused to comply with a demand he had made on them to pay him the dividends due on this stock. The fourth count was the same as the second, except that it applied to the long annuities mentioned in the third count. The cause was tried at the sittings after Trinity term, 1821, and a second time at the sittings after Hilary term, 1822, before the then lord chief justice of the Common Pleas, when a *verdict was found for the defendants. The facts were afterwards ordered by the court to be re-duced into the following case. [*394

The plaintiff, in May, 1819, had standing in his own name in the books of the defendants, 10,000*l.* 3 per cent. consolidated bank annuities, 178*l.* 10*s.* per annum long annuities, and 800*l.* navy 5 per cent. annuities, and was at that time entitled to and in the receipt of the dividends arising from the said stocks. In July, 1819, he received the dividends on the 3 per cent. consolidated, and on the 5 per cent. navy annuities, and in October, 1819, that upon the bank long annuities. The dividends upon 3 per cent. consols and navy 5 per cents. being payable on the 5th of January and 5th of July in every year, and those upon long annuities being payable on the 5th of April and 10th of October in every year.

On the 12th of October, 1819, Messrs. Drummond, the bankers, sold out 5000*l.* 3 per cent. consols, part of the consols then standing in the name of the plaintiff in the books of the defendants, and on the 16th of November following, the farther sum of 5000*l.* 3 per cent. consols, then also standing in the name of the plaintiff in the books of the defendants, under and by virtue of two instruments bearing date respectively the 6th of October, 1819, and the 12th of November, 1819, purporting to be powers of attorney authorizing Drummonds to sell out the two several sums of 5000*l.* consols, and purporting to have been executed by the plaintiff in the presence of and attested in the names of F. Davis and John Henry Davis; but the signatures to which instruments, and the attestations so purporting to be the signatures of F. Davis, were respectively forged and counterfeited by J. H. Davis.

In January, 1820, the plaintiff purchased the further sum of 100*l.* navy 5 per cents., and on the 10th of *February, 1820, Drummonds sold out 75*l.* bank long annuities, part of the long annuities then standing in the name of the plaintiff, in the books of the defendants, under and by virtue of another instrument, bearing date the 2d of February, 1820, purporting likewise to be a power of attorney, authorizing Drummonds to sell out the sum of 75*l.* bank long annuities; but the signature to this instrument in the name of the plaintiff, as well as the attestation of F. Davis, was likewise forged by J. H. Davis. [*395

The plaintiff, at or previous to the dates of the said forged instruments, never had any dealings or transactions with Drummonds, nor did he ever, previously to those dates, employ them in any business whatever, or directly or indirectly authorize or empower J. H. Davis to sell out any of the sums of money so sold out: nor did he afterwards receive any moneys whatever arising from the sale of those sums, knowing the same to be the produce of those sales, or either of them.

On the 3d of March, 1820, J. H. Davis was apprehended and committed to the Giltspur-street compter, to be brought before the Lord Mayor of London, for examination on a charge of forgery of certain acceptances, purporting to be of Messrs. Drummond, and in respect of which the bank of England had no interest or connexion. On the 5th of March then following, the plaintiff, in a conversation which he had with J. H. Davis in the compter, said to him, "As you are charged with committing a forgery on a stranger, have you done any

thing with regard to my property?" To which J. H. Davis replied, that he had taken 10,000*l.* consols, belonging to the plaintiff, and 75*l.*, part of the 178*l.* 10*s.* long annuities. Whereupon the plaintiff observed, "Then you have endeavoured to beggar me." This was the first occasion on which the plaintiff *396] became "acquainted with the sales of the two sums of 5000*l.* consols, and of the 75*l.* long annuities.

On the 3d of April following, J. H. Davis, still being in the compteur, drew a draft in favour of the plaintiff, and also wrote to him a letter. The following is a copy of the draft.

"London, April 3d, 1820.

"Messrs. Drummond,

I desire you will pay to Horatio Davis, Esq., bearer, the balance of my account in your hands, and any money you may receive for me subsequent to this date.

"Your obedient servant, J. H. Davis."

The letter informed the plaintiff that J. H. Davis had enclosed him the above draft for the balance of his account, which he might present when he pleased; and as a reason for drawing generally for the balance, stated among other things, that he had given Drummonds a bill of exchange on Paris, together with a power of attorney to receive his salary from the lord chamberlain's office, two quarter of which would be due on the 5th of April, and, therefore, did not know what money they had of his. By virtue of this draft the plaintiff on the 2d of June applied to Messrs. Drummond, and on the 6th of June obtained from them 23*l.* 2*s.* 6*d.*, being the balance of J. H. Davis's account with them.

On the 7th of April, after his apprehension, and previous to his examination before the lord mayor on the said charge, J. H. Davis escaped from the compteur, and ultimately got out of this kingdom. The plaintiff neither gave information to any person respecting the forgeries or sale, nor made any claim upon the defendants in respect of the sums so sold out, until the 30th of *397] September, 1820, when he executed two powers of attorney, bearing date, respectively, the 27th of September, 1820, thereby authorizing Robert Marsden and Charles Shaw to receive the dividends due upon the said sums of 10,000*l.* consols, and 178*l.* 10*s.* per annum, long annuities. In pursuance of these powers of attorney, Marsden and Shaw applied to the defendants, for the purpose of receiving the dividends upon those sums, but they refused to pay the plaintiff any dividends upon the 10,000*l.* consols, or on the 75*l.* per annum of the long annuities, so sold out as aforesaid.

The jury found that the plaintiff did not know of the forgeries until the 5th of March, 1820, and that he concealed them until the 30th of September, 1820, and that they had no other evidence of adoption than such concealment.

Either party was at liberty to refer to the pleadings or documents in the course of the argument.

If the court should be of opinion, that the plaintiff was entitled to recover, a verdict was to be entered for him for such sum as the court should think fit, for the value of the stock, together with the dividends which would have accrued due thereon, if the stock had still remained standing in the books of the defendants in the name of the plaintiff; but if the court should be of opinion that the plaintiff was not entitled to recover, then the verdict was to stand.

Either party was to be at liberty to turn the case into a special verdict.

This case was argued twice. By *Onslow*, Serjt., for the plaintiff, and *Lawes*, Serjt., for the defendants, in Easter term last; and by *Vaughan*, Serjt., for the plaintiff, and *Taddy*, Serjt., for the defendants in this term.

On the part of the plaintiff it was contended at some length that the bank, as *398] agents for the public, and *thence for every individual concerned in the public funds, were liable to make good the amount of any stock which might have been lost through their own want of caution: when it was observed

by the court that it did not appear on the pleadings, or the finding of the jury, that the plaintiff had lost any stock. There was no allegation that the bank had refused to transfer at his request, but only that they had refused to pay him certain dividends. It was then argued, that the bank receiving a remuneration under 31 G. 3, c. 33, s. 3, for the office of paying the dividends due on the public funds, were guilty of a breach of duty in refusing to pay to those who had a claim; for which breach of duty they were liable to pay damages in action on the case; Com. Dig. *Action upon the Case for Damages*, A. 4. Where it was also said that an action lies against the bank for refusal to transfer. (a) It might be alleged that the plaintiff ought to have disclosed to the bank all the circumstances of the forgery; but the transaction on which the bank grounded their refusal to pay the plaintiff's dividends, namely, the unauthorized transfer by the plaintiff's brother, took place, and his right of action accrued five months before he knew of the forgery. There was no adoption by the plaintiff, of his brother's act, nor even an assent, for such an assent would have amounted to a felony, with which there was no pretence to charge him, the jury having found there was no adoption nor assent, nor any evidence to afford a presumption thereof, except what was occasioned by the concealment from March to September.

Argument for the defendants. There are two grounds which preclude the plaintiff from recovering the *dividends in question. First, the nature of an action on the case. Second, considerations of public policy. [399

First. In an action on the case, a plaintiff is not entitled to recover on any single fact he may be able to establish, but on the justice and equity of all the circumstances of his case taken together; and if it appear that the injury of which he complains is in any way occasioned by himself, his claim is thereby defeated. Even when a complete right has accrued, that right may be divested by subsequent circumstances. As in *Bird v. Randal*, 3 Burr. 1353, where in an action for seducing an apprentice, the court held that the master having recovered satisfaction from one party could not recover it from another. In the present case the defendant having so conducted himself as seriously to injure the bank, cannot claim at their hands the money which he permitted them to lose. The plaintiff knew on the 5th of March, of the improper transfer which had taken place, and this knowledge he concealed from the bank until the month of September following, when he asked for those dividends which he knew must have been, in the mean time, paid to other individuals, and the payment of which he might have prevented by an earlier communication of the knowledge he possessed on this subject. What if this were the case of a private individual? If a man knew that a forgery was about to be committed on his banker or steward, and instead of warning them, were to suffer the matter to pass without observation, and, beyond that, were afterwards to hold communication with the offender himself, and subsequently, when he had escaped, come upon the banker or steward for money which had been paid to the criminal, would he be suffered to maintain his action? If goods be stolen from a carrier, and the owner knows and *assists in concealing the thief, could he recover against the carrier? or if a creditor received or aided a debtor in escaping from the sheriff, could he recover against the sheriff for the escape? An action on the case supposes wrong to have been done by the defendant; but the only wrong in the present case was committed by the plaintiff, who, by the course he has pursued, has, at all events, waived his right to the dividend in question. As to the plaintiff's not having known of the offence till some months after it was committed, his concealment of it then has a retrospective effect, and is the same as if he had known and concealed it from the beginning; just as an assent by assignees of an uncertificated bankrupt, to a trespass committed on his effects, by subsequent creditors, was holden an adoption of the trespass,

(a) 1 Com. Dig. Hammond's ed. 409 n.

though the assent was given long afterwards. *Hull v. Pickersgill*, 1 B. & B. 282.

Secondly, upon grounds of public policy the plaintiff ought not to be permitted to recover against the defendants. No man can sue on a contract which has been carried into effect in violation of law; as a smuggler who has sold and delivered smuggled goods; a printer who has published for an editor, a weekly newspaper, on unstamped paper; a parent who seeks to recover back money on an unstamped apprentice deed; and where a felony has been committed and the felon is known, no action arising directly or collaterally out of the felony, can be maintained till public justice has been satisfied. The public justice of this country, has, in a great degree, been entrusted to the integrity and exertions of individuals, and until the individual has rendered the public service required at his hands, he is not in a condition to sue. The plaintiff, therefore, cannot sue unless he has performed his duty by giving to the bank *401] the information he possessed. In *Dorkes v. Cavenagh*, Styl. 346, 2 Roll. Abr. 557, Rolfe, C. J., held that the party injured could not sue a housebreaker in trespass till after conviction. In that case the action grew immediately out of the felony. The same law appears as to third persons in *Higgins v. Butcher*, Yelv. 90, (confirmed in 1 Levinz, 247,) in *Cooper v. Witham*, 1 Sid. 375, in 2 Hale, 76, in 2 Roll. abr. 557, and in Bract. de coron. B. 3, c. 3, from which authorities it may be collected that the private injury is merged in the public felony. So, under the 21 H. 8, c. 11, no return can be made till after conviction.

The plaintiff was guilty of misprision of felony, (1 Hawk. 73,) and if this action could be maintained the consequences would be most pernicious to the bank, since if a party could recover in spite of his own misconduct he would have no motive to make the necessary communications to a magistrate. The plaintiff permitted the criminal to enjoy the fruits of his crime, during a space of six months, and if he could recover under such circumstances, he would be equally entitled to recover, though he should have connived at the offence during a whole life. As far as the bank and the public are concerned, the circumstance that the criminal was the plaintiff's brother does not alter the case.

In reply it was argued, that the criminal being already in custody, the bank had it in their power to attend to the means of his detention; that communications from the plaintiff were, therefore, unnecessary; and that the plaintiff was in no way privy to the criminal's escape. As to the misprision of felony that would meet its appropriate punishment upon trial and conviction; but if the plaintiff failed in this action, the defendants would have fined him for the offence, without trial, to the extent of the whole of his property.

*402] *BEST*, C. J. After stating the pleadings, proceeded. The first question we are to decide is, have the stocks which stood in the plaintiff's name in the books of the bank been transferred out of that name? We think that the plaintiff's property in the funds has not been transferred; that he is still the legal holder of these funds, and entitled to the dividends payable on account of them. He cannot, therefore, have a verdict on the first or third counts, and there is no occasion for us to consider what verdict is to be entered for the value of the stock which these counts state that the plaintiff has lost by an unauthorized transfer.

The 3 per cent. consolidated annuities are perpetual annuities, which have been created by parliament in consideration of loans made to the state by the original proprietors, subject to a right of redemption in government. The long annuities were created by the same authority and for similar loans, for a certain number of years. Both the consolidated annuities and the long annuities are transferable at the bank. This is not a species of property that could be transferred by delivery; the assent of the owner to part with it must be expressed in writing, and it will be found that it has always been the practice to transfer by writing, and that the

case requires such a mode of transfer. I take it to be clear that a transfer in writing not made by the party transferring, or some agent duly authorized, can have no effect. A forged endorsement on a bill of exchange conveys no interest in such bill. Transferable shares of the stock of any company cannot be divested out of the proprietors by any act of the company without the authority of the stockholders. The Bank of England has no more authority to affect the interest of any stockholder, than the most insignificant chartered company has to dispose of the shares of any of the members of such a company. The legislature (so far *from allowing any act of the bank to deprive the stockholder of his interest,) has taken care to direct in what manner the interest he has in the public annuities shall be conveyed away, and to declare that no other mode of conveyance shall be legal. Under the early loan act tallies were delivered to the first contractors, and they were authorized to transfer their interest by endorsement on their tallies, which endorsements were directed to be registered in the books of the bank. The entry in the bank books of these endorsements were only to inform the government who were the persons to whom the dividends were payable, the right of these persons depending entirely on the endorsement on the tally. With this endorsement the bank had no more to do than they have with the endorsement on any bill which they have accepted, and yet they were as much bound to pay the dividends according to the endorsement on the tally, as they are to pay their acceptance according to the endorsement on the bill accepted. These tallies are not now used, but the shares of the loan contractors and their assignees are registered in books kept at the bank. In many, if not all the loan acts, the mode of transferring stock is prescribed by the following words: "There shall be kept in the office of the accountant in London, books wherein transfers of stock shall be entered, which entries shall be signed by the parties making such transfers, or by their attorneys authorized by writing under their hand and seal, and attested by two witnesses; and the persons to whom such transfers are made, shall underwrite their acceptance, and no other method of transferring stock shall be good." The assignment by the stockholder, and the acceptance by the assignees complete the transfer. The bank have no part in this transaction; they are only to see that it is properly registered in their books. In the present *case [403 the assignment by the stockholder is wanting, the persons who made the assignment having no authority from the stockholder. The bank books should contain a perfect transfer, and I admit that even copies of these books are *prima facie* evidence in a court of justice, that such a transfer has been duly made. This is settled by the cases of *Breton v. Cope*, Peake's N. P. 43; *Marsh v. Collnett*, 2 Esp. 665, and *Auriol v. Smith*, 18 Ves. 206. In *Auriol v. Smith*, the lord chancellor made an exception to this rule, which applies to the present case. His lordship says, "Where the question is whether a *transfer* purporting to be the handwriting of an individual is genuine, the books themselves must be produced." Why? That the party supposed to have made the transfer might show that it was not his handwriting. If a stockholder is permitted to show that a transfer purporting to be made by himself is not his writing, he must be permitted to show that when a transfer is made by attorney, the pretended attorney had no authority, the power under which he claimed to act being a forgery. We are not called on to decide whether the bank, the parties who presented the forged power of attorney, or the parties who accepted the stocks under the transfer are to endure the loss. We know that funds will not be issued from the exchequer to pay the dividends on the stock in the plaintiff's name, and the same stock in other persons' names. We feel that these circumstances may occasion difficulty and embarrassment to the bank. We think, however, that the bank should be subjected to such difficulty and embarrassment, rather than the stockholder should suffer injustice. It is the duty of the bank to prevent the entry of a

transfer until they are satisfied that the person who claims to be allowed to *make it is duly authorized to do so. They may take reasonable time *405] to make inquiries and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder who is to suffer, if *for want of inquiring*, and it does not appear that any inquiry was made in this case, they are imposed upon, and allow a transfer to be entered in their books, made without a proper authority. We cannot do justice to this plaintiff unless we hold that the stocks are still his. If we say that they have been transferred, and that he must take a verdict for compensation for the loss of them, (as these transactions occurred four years ago,) the highest sum that we can give upon this verdict will fall very short of what it will cost the plaintiff to replace his capital, and he must besides lose all the dividends that have become due since the trial, which took place nearly two years ago. In every case that can occur, the stockholder (if he is to proceed for compensation) must run the risk of having his capital and income diminished by a rise in the funds between the verdict and judgment, and if that judgment be delayed, as will frequently happen by the occurrence of any legal difficulty, he will lose the dividends that would have become due to him during that time. This case shows that time may be several years. It may be said he may prevent this by replacing the stock, but it may frequently happen that he is not in a condition to do this. Another consequence of the stocks being considered as transferred, will be most alarming to those who live at a distance from London, and receive their dividends by attorney; namely, that their claim to compensation in case their stocks should be transferred without their authority may be barred by the statute of limitations. What has lately occurred has shown us that the forging of powers of attorney to transfer stock may be concealed *for more than six years, *406] and the cases of *Battley v. Faulkener*, 3 B. & A. 288; *Short v. McCarthy*, id. 626, and *Brown v. Howard*, 4 Moore, 508, prove that the statute of limitations begins to run from the time of the act being done that gives occasion to the action, although it was not known to the party who suffers from it. I can find no case in which the question whether the stock is transferred by the act of the bank has been raised. There is one in Barnadiston's reports, p. 324, where a man of the name of Edward Harrison, got South Sea stock which belonged to another Edward Harrison, put to his account in the books of the company, and then transferred this stock to his broker to sell, and which stock the broker sold. A bill was filed by the executor of Edward Harrison, the owner of the stock, against the executor of Edward Harrison who so fraudulently procured it to be put into his name, and the chancellor said, that the plaintiff should have a quantity of stock equal to that transferred bought for him, or else have a satisfaction for the stock equal to what it was worth at the time it was sold out; and his lordship added, there is another and more difficult question, and that is, how far the company may be liable to make satisfaction in case there are not sufficient assets left by the Harrison who improperly possessed himself of this stock.

In this case it seems to be assumed that the stock had passed out of the name of the owner by this transfer, under a fraudulent assumption of his name, although he never assented to such transfer; but whether it had so passed or not was not considered, and I therefore cannot think this case any authority against our opinion if it were correctly reported. I think, however, that this case is not correctly reported by Barnadiston: the same *case is to be found in 2 Atkins, p. 120, in the name of *Harrison v. Harrison*. *407] In this report it appears that the stock was transferred by a trustee, and if so, the question whether a transfer unauthorized by the stockholder, would alter the property in the stock could not arise: the trustee having a legal authority to transfer, although he might be guilty of a breach of trust by

exercising that authority. This circumstance also accounts for the doubtful manner in which Lord HARDWICKE speaks of the liability of the company to replace the stock. The question there was whether the South Sea Company were bound to prevent a breach of trust, and not whether a stockholder's name can be taken from the books without his own authority, and the company that has permitted this act not be responsible for the consequence of it. We are not called on to decide whether those who purchase the stock transferred to them under the forged powers might require the bank to confirm that purchase to them, and to pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries. But to prevent as far as we can the alarm which an argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not *the owners. If this be not the law, who will purchase stock, or [*408 who can be certain that the stock which he holds belongs to him? It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfers to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it the practice ever to attempt to look further than the bank books for the title of the person who proposes to transfer to you.

These stocks remaining the property of the plaintiff, and his right to them not being affected by the forgeries, what is to prevent his recovering the dividends due in respect of such stocks? It appears in this case that he did not know of the forgeries until several months after they were committed. It is true, that when his brother informed him that he had committed these forgeries, the plaintiff did not communicate such information either to the bank or to any magistrate until after the brother had escaped from the prison in which he was confined, and was probably out of the kingdom. The plaintiff also accepted from his brother a draft for the balance which he had in Drummonds' hands. This conduct of the plaintiff might, under circumstances, amount to a misdemeanor, the law of England, which gives to individuals the important right of prosecuting criminals, requiring all men to assist in the furtherance of such prosecutions, and punishing those who conceal *or compound felonies. It has been truly said that the [*409 plaintiff could in this case only seek to recover such dividends as he had required the bank to pay him, and which they, having been so required, had refused to pay, and that the dividends demanded were those which became due on the long annuities on the 5th of April, 1820, and those on the consols, which became due in the July of the same year. These dividends, it is insisted, the plaintiff is barred from recovering, because the bank (the plaintiff not having given them information of the forgeries) *may* have paid them to other persons. We agree with the counsel for the bank, that if it had appeared that the bank had paid these dividends to persons to whom (if the plaintiff had informed them of the forgeries as he ought to have done on the 5th of March, 1820,) they could have refused to pay them, he cannot recover such dividends in this action. We

say in the language of Lord MANSFIELD, in *Bird v. Randal*, 3 Burr. 1353, "That whatever will in equity and conscience according to the circumstances of the case bar the plaintiff's recovery, may be given in evidence by the defendant, because the plaintiff must recover upon the justice and conscience of his own case, and on that only;" but we say that it does not appear on this case that any thing was given in evidence by the defendants that did in equity and conscience bar the plaintiff. It is not enough for the defendants to say that they might have paid these dividends to other persons: to defend the action on the principle laid down by Lord MANSFIELD, they must prove that they have paid them to persons to whom they could have refused to pay them had they been informed of the forgeries. No evidence of any such payment appears on the case. It has been insisted at the bar, that upon principles of public policy

*410] we ought not to permit the plaintiff to prevail in his action. *Public policy is a doctrine on which judges should proceed with caution, otherwise the rights of the subjects of this country would depend on their discretion. There are many things which most of us think against good policy, for which actions are brought; for instance, wagers. We ought not to trust ourselves with so dangerous a power as that of acting judicially on disputable policy. Can we say that indisputable policy requires that a man should lose his all for misprision of felony? Policy prevents the assertion of a civil right only in cases where the action is brought for doing something directly injurious to the public, or declared to be so by positive law. Thus, if the law has forbidden the doing of an act, it has recognised the impolicy of doing it; or if it has commanded an act to be done, it has recognised the impolicy of not doing it, and the courts would not allow an action to be maintained for doing the act prohibited, or abstaining from doing the act commanded. Therefore, if the plaintiff's action had been founded on the concealment of the forgeries, it could not have been supported. But the action is founded on the refusal of the bank to pay on demand the dividends of the plaintiff, due on stocks belonging to him. The misprision of felony of which he has been guilty forms no part of his case. If misprision of felony is to be opposed to the action, it must be on the ground that the plaintiff having had a good cause of action on account of the bank's refusing to do their public duty by paying him his dividends, has forfeited his right to maintain such action by being guilty of misprision of felony. We know nothing of forfeitures on notions of public policy. For forfeitures we must have positive law. Misprision of felony is but a misdemeanor, and punished not by any forfeiture, but by fine and imprisonment, at the discretion of

*411] the court before which the offender is convicted. The defendant's *counsel have attempted to apply to this case the rule that civil actions are merged in a felony. If the plaintiff was seeking to recover what had been obtained by means of these forgeries, either from the forger or any person who had received it from him, defendants might protect themselves under this rule. But it has never been held that the owner cannot, before prosecution of the felon, proceed for redress against the persons through whose negligence the thief committed the felony. If goods are stolen from a carrier or innkeeper, the owner may bring his action against them without instituting any prosecution against the felon. The bank stand in the situation of the carrier and innkeeper. It has never been decided that a concealment of the felony from the carrier or innkeeper by the owner of the goods was an answer to such an action. Concealment can be no answer, except the jury were to infer from it that the owner was privy to the robbery, or the defendant could show that such concealment had prevented him from recovering the goods. This case was put to us in argument. A. knowing that B. has forged A.'s name to a draft on his banker, sees B. come out of the banker's shop with the money obtained by the forgery, and neither arrests B. nor gives any information to the banker.

Could A. recover this money again from the banker? A jury in such a case must find that A. was privy to the forgery at the time it was committed, and would, I think, infer that A. assented to it, and such finding would prevent his recovering in an action against the banker. But in the present case the jury have expressly negatived all knowledge on the part of the plaintiff until three months after the forgeries. They have also negatived assent, saying they have no evidence of assent except the concealment of what came to the plaintiff's knowledge five months after the forgeries, from which they have not inferred assent, nor can we. A verdict *must, therefore, be entered for the plaintiff on the second and fourth counts, for the amount of the dividends [412 demanded by him from the bank, and which they, contrary to their duty, refused to pay him.

Judgment for the plaintiff, accordingly.

NELSON v. GRIFFITHS.

Nine counts on the following words, and the colloquium in which they occurred: "Nelson's failed lately, and only paid ten shillings in the pound."
The court refused to strike out any as unnecessary.

THE pleader had drawn nine counts on the following words, "Nelson's failed lately, and only paid 10s. in the pound," and the colloquium of a few sentences in which they had been introduced. The colloquium contained nothing else actionable.

Spankie, Serjt., obtained a rule nisi to refer it to the prothonotary to strike out seven of these counts as unnecessary, alleging, that according to the practice a count was deemed unnecessary whenever it could be supported by precisely the same evidence as another count in the same declaration, which he contended must, from the brevity of the supposed slander, be the case with many of the counts objected to.

Lawes, Serjt., showed cause, and

The Court thought as the slander was introduced in a colloquium, the circumstances of which it might not be easy precisely to fix, and as the rule with regard to variances was so strict, the plaintiff ought not to be tied down in the way proposed.

Rule discharged.

*THE KING v. FAUNTLEROY.

[413

A power of attorney for the transfer of government stock is a deed within the meaning of 2 G. 2, c. 25; and a conviction under that statute for the forgery of such a power was holden sufficient.

THE indictment upon which the prisoner was tried and convicted at the last Old Bailey sessions, consisted of eleven counts. The first count was for forging a deed, and was framed upon the 2 G. 2, c. 25, and 31 G. 2, c. 22, s. 78.

The second charged him with the offence of uttering and publishing as true a forged deed, knowing the same to be forged, and was framed upon the same statutes.

The third count was founded upon the 45 G. 3, c. 89, and charged the prisoner with disposing of, and putting away a forged deed, knowing the same to be forged. The instrument set out in these three counts was a letter or power of attorney for the transfer of 5000*l.* 3 per cent. consols, and purported to have been signed, sealed, and delivered by Frances Young. The offences were charged to have been committed with the intention of defrauding the Governor and Company of the Bank of England. The power of attorney contained, as is usual in such cases, a covenant with the bank, that the executors and admi-

nistrators of the donor, should allow and confirm whatever should be done by the attorney, after the decease of the donor.(a)

The fourth, fifth, and sixth counts were similar, only charging him with an intent to defraud Frances Young.

The seventh, eighth, and ninth were also similar, only charging him with an intent to defraud one William Flower.

*414] The tenth and eleventh counts were framed upon the *8 G. 1, c. 22, and the 31 G. 2, c. 22, s. 77, and charged the offence of forging a letter of attorney, &c.

The verdict returned by the jury, was guilty of uttering a forged power of attorney, knowing it to be forged.

The verdict was entered only on the second, fifth and eighth counts of the indictment.

The prisoner petitioned the crown, and his case was argued before the twelve judges in the long room, sessions house, Westminster, on the 24th and 25th of November.

Broderick for the prisoner. The prisoner has been convicted of uttering and publishing as true, a forged deed, and that deed is described as a power of attorney. It is proposed to show, first, that the word *deed* does not at common law clearly and unequivocally comprise a letter of attorney; secondly, that the word cannot comprise that instrument upon the construction of the 2 G. 2, c. 25; 31 G. 2, c. 22, s. 78, and 45 G. 3, c. 89; but it will be necessary to advert in the first place to the cases of *R. v. Wait*, 1 Bingh. 121, and *R. v. Lyon*, 2 Russell, 1602, lest they should be esteemed conclusive on the point in dispute. Now in *R. v. Wait*, the only question agitated and decided was touching the admissibility of an interested witness. In order to show that he was interested, it suited the counsel for the prisoner to assume that the power he had forged was a deed, for the purpose of arguing that it could not be revoked except by deed; and it was sufficient for the counsel on the part of the crown to show, as he did, that the instrument might be revoked by matter in pais without contesting the point whether or no it were a deed. In *R. v. Lyon* the question *415] was, not whether a power of attorney were a deed "under 2 G. 2, c. 25, but whether an instrument not conforming with certain formalities prescribed by act of parliament, were a power of attorney. [BAYLEY, J. In that case all the judges thought the power was a deed within the meaning of 2 G. 2, c. 25.] The case, however, was not argued, and that point only arose incidentally. It ought now to be considered as if it were *res integra*.

First, then, though the word deed is occasionally and loosely used in a larger sense, in its more accurate acceptation it only means an instrument in writing sealed and delivered, and containing some contract or grant on the part of the person by whom it is executed. Lord Coke defines it as follows, "a deed, factum; this word (deed) in the understanding of the common law, is an instrument written on parchment or paper, whereunto ten things are necessarily incident;" among which he enumerates, "a thing to be contracted for," Co. Lit. 35 b: and, in another place, "fait, factum, Anglice a deed, and signifieth in the common law an instrument consisting of three things, viz. writing, sealing, and delivery, comprehending a bargain or contract between party and party," id. 171 b. Comyns has it, "a deed is a writing containing a contract, and signed, sealed, and delivered by the party," Com. Dig. *Fait*, (A 1.) Spelman's definition is, "factum a forensibus nostris dicitur scriptum solenne, quo firmatur donum concessio pactum contractus," Spelm. Gloss. *Factum*, and this definition Ducange has copied into his glossary, word for word. Cunningham, in his law dictionary, defines deed, "an instrument written on parchment or paper, consisting of three things, viz. writing, sealing, and delivery, and comprehending a contract or bargain between party and party;" and in Cowel's law dictionary, and

(a) See the form 1 Bingh. 124.

Wood's Institute, p. 217, the same definition is to be found. *Now these definitions plainly exclude a letter of attorney, which, though in writing, and sealed and delivered, contains no matter of contract, properly so called, nor even matter of grant: conferring a mere authority or power, it neither conveys, secures, nor releases any *interest* in its legal acceptation as distinct from power; and to this distinction important incidents are attached; for instance, such an instrument may be revoked by mere matter in pais, whereas if it were a deed it could only be revoked by deed, eo ligamine quo ligatur. It may further be remarked, that from the earliest period instruments of grant or contract under seal have always been denominated facts or chartæ, while instruments merely conferring a power have been distinguished from them by the appellation literæ. In Madox's *Formulare Anglicanum*, a power to enfeoff, of the date of 4 Ed. 2, is expressly termed literæ, while the deed of feoffment to which it refers is styled carta. "Attornavi et loco meo posui W. A. ad ponendum J. H. in seysinam, etc. secundum quod in quâdam cartâ inter me et præductum J. H. inde factâ plenius continetur; ratum et gratum habitura quicquid idem W. duxerit faciendum, etc. In cujus rei testimonium has literas sigillo meo signatas fieri feci patentes." So, in another preserved by the same author, of the date of 1235. "Universis Christi fidelibus presentes literas inspecturis." Fleta, referring to the offence of forgery, says, "Crimen verò falsi dicitur cum quis accusatus fuerit quod sigillum regis vel appellatus quod sigillum domini sui de cujus familiâ fuerit, falsaverit, et breviam inde consignaverit, vel chartam aliquam vel literam ad exheredationem domini vel alterius damnum sic sigillaverit." Fleta, lib. 1, c. 22, p. 32. The distinction thus made from the earliest times, has been carried forward in the acts more particularly applicable to the subject, and that a letter of attorney does not form the only example of an instrument under seal not comprised within the legal description of a deed, appears from one of the earliest statutes relating to forgery: the 5th Eliz. c. 14, provides, that if any person shall forge any false deed, charter, or writing sealed, court roll, or the will of any person, he shall be set on the pillory; and in *Taverner's* case, Dy. 322, decided shortly after the passing of the statute, the Court of King's Bench held that a forgery of a customary of the manor of N., having affixed to it seals, purporting to be the seals of the copyholders, fell under the description of a writing sealed within this statute. A will, though a writing under seal, is not a deed, and in *Dod v. Herbert*, Styl. 459, it was holden there need be no profert in curiam of an award; Glyn, C. J., saying, "If an action of debt be brought upon an obligation, the obligation ought to be produced, and in all other cases where things cannot be demanded but by deed; but here is no deed in the case, for an arbitrament under seal is no deed, (and the arbitrament may be made without a deed,) and therefore it is not necessary to be produced in court, for it is but a writing under hand and seal." The same may be said of an inquisition taken by the sheriff on a writ of inquiry, and returned under seal: so of a warrant of a justice of peace under seal. In the year book 35 H. 6, p. 37, "in a writ of forger of false deeds, the plaintiff supposed by his writ that the defendant had forged diversa falsa facta et munimenta, and the defendant demanded judgment of the count, for the count alleged that the defendant had forged a certain deed of feoffment, purporting to be the feoffment of one T., and also a writing or muniment by which T. purported to make C. his attorney to deliver seisin, so that the count is not conformable to the writ, for the writ alleges diversa falsa facta, et munimenta, and the count only alleges one deed;" and of this opinion was PRISOT, C. J., though what was the ultimate decision in the case does not appear. Now, though this case does not expressly decide that a letter of attorney is no deed, yet it shows that deed is not the proper appellation for such an instrument, for if it were, why should the pleader have unnecessarily substituted in his count the words "writing or muniment," or what

ground could there have been for Moile's argument, which alleges that a letter of attorney cannot be described in pleading, as a deed?

It may be urged, that the covenant contained in the present power of attorney amounts to a bargain or contract between party and party; but similar covenants have been contained in powers of attorney from the earliest period, as in the very first of the ancient documents preserved by Madox, p. 346; and if there be any weight in the preceding reasoning, it applies to the instruments in the form in which they have always been couched, whether that form amounts to a covenant or not; in fact, however, the instrument does not contain that which amounts to a covenant, for if it did, an action would lie on such covenant. But no action could be brought by the bank on this covenant, for it is one which in its nature never can be broken. In the event of the death of the party without notice, the bank would, by virtue of the power, transfer the stock, and such transfer being made, a ratification on the part of the executors could never be required, for if they should choose to impeach the transfer and bring their action against the bank, that action would at once be barred by production of the power itself. This clause, therefore, though a covenant in its shape, is in substance a mere amplification or repetition of the preceding words of authority. *It is consequently in legal effect not a contract, but a power.

*419] If, then, the word deed does not at common law strictly include a power of attorney, considerable advance has been made towards the second proposition, that it will not include such an instrument upon the construction of 2 G. 2, c. 25, and 31 G. 2, c. 22, s. 78. Now every statute ought to be construed, not according to the letter, but according to the intent of parliament,^(a) and penal statutes ought always to be construed strictly. Thus 1 Ed. 6, c. 12, having enacted a punishment for those who were convicted of stealing horses, the judges conceived that it would not extend to him who should steal but one horse, and therefore 2 & 3 Ed. 6, was passed to supply the defect: so the 14 G. 2, c. 6, which made it capital to steal sheep or other cattle, having been holden to extend only to sheep by reason of the ambiguity of the word cattle, the 15 G. 2, c. 34, passed to supply the omission. A penal statute, therefore, cannot extend to other cases than those intended by the legislature, even though within the mischief aimed at,^(b) and in order to attain the intention of the legislature, the preamble of a statute ought to be first considered.^(c) The preamble of the 2 G. 2, c. 25, recites, that whereas the wicked, pernicious, and abominable crimes of forgery, perjury, and subornation of perjury, have of late times been so much practised, &c., that it is necessary for the more effectual preventing of such enormous offences, to inflict *a more exemplary punishment* on such offenders, than by the laws of this realm can now be done:” The statute then enacts, that persons who forge any deed, will, testament, &c., shall suffer the *420] punishment of death *without benefit of clergy. It is manifest from this preamble, that the legislature intended to inflict a more severe punishment upon offenders who forged deeds than the law before authorized: but this intention was inoperative, as applied to a letter of attorney for the transfer of stock; because, by a prior statute, the 8 G. 1, c. 22, the preamble of which does not mention deeds, it was made a capital offence to forge a letter of attorney of that description, with regard to the capital stock of joint stock companies, and therefore the legislature could not intend by the word “deed” in the 2 G. 2, to describe a letter of attorney against the forgery of which there was already a specific enactment. The 31 G. 2, c. 22, s. 78, after reciting that doubts might arise, whether the 2 G. 2, c. 25, extended to the commission of the like forgeries with the intention to defraud any corporation, re-enacted the 2 G. 2, and supplied the defect: but it is a striking fact, and strongly confirmatory of

(a) Com. Dig. *Parl. R.* 10 b; 2 Roll. Abr. 318; Pl. Com. 352. 363; 10 Rep. 57 b.

(b) 4 T. R. 665; 5 B. & A. 501.

(c) Com. Dig. *Parl. R.* 11; Pl. Com. 173. 204.

the argument here used to show the intent of the legislature, that by the preceding section (the seventy-seventh) of this act of parliament, the punishment imposed by the 8 G. 1, is extended to the forging any letter of attorney which related to the transfer of capital stock or funds established *since the passing of the 8 G. 1*. For if the legislature had intended to comprise letters of attorney under the terms "any deed" used in the 2 G. 2, and in the next section of this statute, this provision would have been nugatory. The fact, therefore, that the seventy-seventh section relates specifically to letters of attorney, and the seventy-eighth section to deeds, proves to demonstration that the legislature treated them as the objects of distinct provisions, and did not intend under the word "deed" to include a letter of attorney for the transfer of stock; and it is no answer to this argument to allege, that the terms "letters of attorney" do not necessarily import instruments signed, sealed, and delivered, but "also" [*421 comprehend instruments under hand, which the legislature meant to protect against forgery, because, even admitting that an attorney may for some purpose be appointed by a writing under hand only, it is matter of notoriety that the letters of attorney for the transfer of the public funds both at the time the 8 G. 1 passed and ever since, have necessarily (in compliance with the bank regulations) been instruments signed, sealed, and delivered, and it was manifestly the object of the legislature to prevent the forgery of such instruments by the 8 G. 1, and the 31 G. 2, c. 22, s. 77. From a review of various other statutes relating to forgery, it will also clearly appear that the forging of letters of attorney, and of deeds, have uniformly been considered as distinct subjects of penal legislation.

In the 4 G. 3, c. 25, s. 16, (which extended the provisions of 8 G. 1, c. 22, and 31 G. 2, c. 22, s. 77, to the capital stock of bodies politic and corporate, "which now are or hereafter shall be established,") the words letters of attorney are used, but not the word deed. The same is the case in the 37 G. 3, c. 122, which inflicts the punishment of transportation on offenders who forge the name of any person purporting to be the attesting witness to any letter of attorney for the transfer of stock. The 45 G. 3, c. 89, s. 1, recites the provisions of the 2 G. 2, c. 25, and the 7 G. 2, c. 22, and extends them to every part of Great Britain, but does not contain the words "letters of attorney."

The 31 G. 2, c. 10, s. 23, relates to the forgery of letters of attorney to receive seamen's wages, and the 9 G. 3, c. 30, s. 6, to the uttering such forged letters of attorney. The 45 G. 3, c. 72, s. 121, and 57 G. 3, c. 127, s. 4, re-enact, consolidate, and extend the provisions of the two former statutes: all of them specifically mention letters of attorney, but not deeds: these letters of attorney for receiving seamen's wages, are signed, "sealed, and delivered; the enactments, therefore, directed against the forgery of them" [*422 are futile if such instruments are comprehended within the word deed found in 2 G. 2, c. 25. The plain and legitimate conclusion deducible from a just application of the rules of construction to those numerous acts of parliament is, that the legislature never intended, under the word "deed" in the 2 G. 2, to comprise letters of attorney under hand and seal for the transfer of public stock. It is clear that the legislature has made the forgery of these letters of attorney the subject of specific enactments, and it is equally clear, that the various enactments on the subject since the 2 G. 2, c. 25, are nugatory if such letters of attorney fall within the legal description of "deeds." If one mode of expounding the statutes leads to the conclusion, that the legislature has, through a long series of years, and on various occasions, used language without an intelligible object, and if another mode of exposition shows the various provisions upon the same subject to be consistent and intelligible, no one can doubt which mode ought to be adopted. It is true, that in none of these statutes is the act of knowingly uttering a forged letter of attorney, (eo nomine,) for the transfer of government stock made a capital offence, but this omission, even if uninten

tional, furnishes no sufficient reasons for straining the words of the 2 G. 2, beyond the true intent and meaning given to them by the legislature, where that intent is so clear as it is conceived to be in the present case.

Bosanquet, Serjt., for the crown. First, the proposition advanced on behalf of the prisoner, that an instrument signed, sealed, and delivered, conveying a power for the selling of stock, and so, ancillary to a contract, is not a deed, is an untenable proposition. The definition cited from Lord Coke, from whence it *423] has been copied into *the other text writers, is too narrow, and completely at variance with other passages in his own works. In the 1st Inst. 52 a, for instance, he says that the authority to deliver seisin must be by deed; that a letter of attorney is as much as a warrant of attorney by deed, "for literæ doe signify sometime a deed, as literæ acquietanciæ doe signify a deed of acquittance; and herewith agreeth Britton." This passage not only shows that contract is not essential to a deed, but is an answer to the argument which has been raised upon the supposed distinction between chartæ and literæ; namely, that chartæ is the only term employed for deed, and that instruments called literæ, are not deeds. In *Goddard's* case, 2 Rep. 5, Lord COKE expressly says, "there are but three things of the essence of a deed; viz., writing on paper or parchment, sealing, and delivering;" and the same position is laid down in 2 Roll. Abr. 21, under the head, "What things are necessary to the making of a deed." Spelman's definition of a deed, the whole of which was not cited, is, "Factum, a forensibus nostris dicitur scriptum solenne, quo firmatur donum, concessio, pactum, contractus, et *hujusmodi*; aliàs charta; et est vel simplex vel indentatum; hoc, ubi plures contrahunt; illud, *ubi solus quispiam agit*." But the instances are numerous in which deeds are executed, which are neither contracts nor bargains: as a spontaneous release, or confirmation, or a disclaimer by deed. It is also repeatedly laid down by Lord COKE, that an authority given by a corporation where an interest is to pass, must be by deed. So also, a letter of attorney to deliver seisin. If a man levy a fine without a deed to lead the uses, the uses will result to himself. Then if, without any contract, he should declare the uses to himself for life, remainder to his eldest son in tail, and so on, would such declaration in writing, sealed, and delivered, *424] *fail to be a deed? The case which has been cited from the year book 35 H. 6, p. 37, is, as far as it goes, in favour of the position, that a power of attorney may be a deed; for it may be collected from the language of PRISOT, C. J., that if the power of attorney had been called a deed in the count, so as to satisfy the expression *diversa facta* in the writ, no objection could have been taken. An amendment, indeed, was proposed, upon which, however, it does not appear whether any decision was come to. In *Taverner's* case the only question was, whether the forgery of an instrument, conveying an interest in copyhold property, was within the statute of 5 Eliz. c. 14, s. 2, and nothing turned on the question what was or was not a deed. With respect to awards, it is true that they are not necessarily deeds, but the arbitrator may make them so, if he resorts to a formal sealing and delivery. In *Dod v. Herbert*, Glyn, C. J., says, it may be without deed; from which we are necessarily led to infer, that it may also be by deed; and in *Brown v. Vauver*, 4 East, 585, LAWRENCE, J., says, "If an arbitrator deliver an award under seal as a deed, it must then have a deed stamp; but if it were by writing under seal, yet not delivered as a deed, it was sufficient to employ a common award stamp."

It is not necessary to answer the arguments which have been advanced with respect to the nature of the covenant contained in the power of attorney forged by the prisoner, because it has been shown that contract is not essential to a deed; the covenant, however, is by no means nugatory as has been asserted; for though a power is revoked by the death of the donor, a covenant is not; and, therefore, inasmuch as the testator cannot, by the grant of the power, bind

his representatives, he binds them by the covenant, in case they should resist what is proposed to be done under the power.

*Secondly, the instrument in question was a deed contemplated by the statute 2 G. 2, c. 25. The 8 G. 1, c. 22, makes it a capital offence [425 to forge any *power of attorney* for the transfer of any of the capital stocks mentioned in that act, which does not relate to the government funds. The 2 G. 2, c. 25, makes it capital to forge, or utter, knowing it to be forged, any *deed*, will, testament, &c. The 31 G. 2, c. 25, s. 78, extends the 8 G. 1, c. 22, to capital stocks subsequently created, and the 2 G. 2, c. 25, to forgeries committed with intent to defraud any corporation. In this act, the provision respecting powers of attorney in 8 G. 1 is repeated verbatim. From whence it has been argued, that because the framers of the latter statute, in their anxiety to extend to subsequently created stocks, the law applicable under 8 G. 1 to the stocks existing at that time, copied the whole clause out of that last-mentioned act,—instead of inserting, “with the exception of such powers of attorney as are by deed, they having been provided for by the general statute that intervenes,”—the general law contained in the intervening act is not to apply to offenders in respect of powers of attorney by deed.

But it is clear that affirmative words in a statute do not repeal any provisions in a prior statute that can consist with them, and there is nothing in the intervening statute which is inconsistent with the provisions of the two others; if there were any force in the argument adduced, it might be contended that all instruments particularly specified in canal or turnpike acts were for that reason excluded from the general provisions of 2 G. 2, c. 25. The 4 G. 3 was only passed to extend the provisions of 8 G. 1 and 31 G. 2 to transferable annuities established by subsequent acts; it repeats the language of 8 G. 1, and does not interfere with the general provisions of 2 G. 2, c. 25. The 37 G. 3, c. 122, applies only to the particular offence of *forging the names of attesting [426 witnesses to powers of attorney, and therefore does not affect the present question. Then the practice for a long series of years confirms the construction which it is proposed to put on the 2 G. 2, c. 25. In the indictment against Weston, in 1796, there were two counts for forging a deed, two for uttering, and two for forging a power of attorney; in 1801 the indictment in *R. v. Cock* was in the same form. In *R. v. Ann Hurle*, 1804, the indictment was for forging and uttering a deed, without any count for forging or uttering a power of attorney; but one of the counts was framed on the 31 G. 2, and alleged the intent to be to defraud the Governor and Company of the Bank of England; another, to defraud one B. Allen. In 1816, Joseph Boyce was convicted under the 2 G. 2, c. 25, of forging a letter of attorney, and in 1817, Mary Anne James; in the indictment against whom there was no count mentioning the letter of attorney. The last case was that of *R. v. Wait*, which was argued before the twelve judges, and the proposition now contended for was never suggested by the counsel or court, though the nature of a power of attorney was very fully considered. In 1818, Lyon was tried and convicted under the 2 G. 2, c. 25, for forging a power to receive seamen's wages, for which power, according to the provisions of 45 G. 3, c. 72, a particular form was prescribed, and though the prisoner had failed to pursue this form, the instrument was holden in all respects as a deed, and binding on the party who delivered it. [PARK, J., referred to the case of Sophia Pringle, executed in 1787 under the statute of 2 G. 2, c. 25, for forging and uttering as true a forged deed purporting to be a power of attorney.]

The 45 G. 3, was passed subsequently to many of these convictions; it enumerates all the instruments mentioned in the 2 G. 2, and if there had been at the *time of its enactment any doubt as to the propriety of those convictions; if it had been imagined that the word deed was not sufficient [427

to cover a power of attorney, that instrument would have been specifically mentioned in that statute.

In reply, it was urged with respect to the old definitions of a deed, that the casual observations on the subject, to be met with in various parts of Lord Coke's writings, ought not to be set up against his more deliberate definition. But that even admitting the definition by Lord Coke to be too narrow, the definition by Spelman could not be objected to, and that would not include a letter of attorney. "Factum dicitur scriptum solenne quo firmatur donum, concessio, pactum, contractus, et hujusmodi, alias charta." Donum, concessio, pactum, contractus, all imply instruments conveying an interest, to which kind of instruments alone *hujusmodi* can refer, and therefore does not include a power. With respect to the remaining part of the passage, "Est vel simplex vel indentatum; hoc ubi plures, illud ubi solus quispiam agit," agit can only apply to the conveyance of an interest, and not to the granting of a power. All the instruments specified on the part of the crown as being instances of deeds containing no contract, are, at all events, instruments conveying an interest, and so fall within Spelman's definition; as a release, a confirmation, deed to lead uses, disclaimer, &c. And when Lord Coke says that *litteræ* do sometimes mean a deed, he means merely an instrument framed with the usual formalities attending a deed; it is to these only that he refers, when he says that there are but three things requisite to constitute a deed; writing, sealing, and delivering being merely ceremonies to authenticate a contract or grant. The case in the year books was *428] only cited to show that it was there esteemed doubtful *whether a letter of attorney could be pleaded as a deed, but in the judgment of the learned compiler of the edition, the result of the case was, as expressed in the table to the year book, that a letter of attorney was not a deed, *ut videtur*; and Broke states the case thus: "Le brief fuit, diversa facta et munimenta, et le count fuit de un fait de feoffment et un lettre d'attorney; et ideo optima opinio que le count abattera par ce que n'est guarr: per le brief." With regard to the covenant contained in the power of attorney, it was not a contract on which any action could lie, but to prevent circuity of action might be pleaded as a release. *Ayliff v. Scrimshire*, 1 Show. 46; *Hodges v. Smith*, Cro. Eliz. 623; 1 T. R. 446.(a) Then with regard to the statutes, the position that affirmative words in a subsequent statute do not take away the effect of affirmative words in a prior, applied only to statutes in *pari materiâ*; and in addition to the instances which had been given, in which the legislature had uniformly made a distinction between deeds and letters of attorney, the various stamp acts might also be referred to, in which deeds and letters of attorney for the transfer of stock, &c., were placed under different classes, and different duties were made payable for each of them.

The Judges expressed no opinion publicly, but the prisoner was executed.

(a) Per Buller, J., in *Smith v. Mapleback*.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

IN THE FIFTH AND SIXTH YEARS OF THE REIGN OF GEORGE IV.

***GUEST and Another v. JAMES WILLASEY, an Infant, MARY J. WILLASEY, SARAH C. WILLASEY, WILLIAM WILLASEY, [*429 EDWARD WILLASEY, MARIA RUTH WILLASEY, ALICIA WILLASEY, also Infants, and N. SALISBURY and A. GARNETT.**

Three codicils of different dates endorsed on the back of a will. The two first referred to lands mentioned in the will, made a disposition of lands purchased subsequently to the will, according to directions in the will as to the devisor's lands in general, and appointed new executors, but were attested by only two witnesses each. The third only appointed a new executor in the room of an executor named in the second codicil, but was attested by three witnesses:

Held, that the third codicil was a republication of the second and of the will, and that the land acquired subsequently to the will passed according to a disposition made in the will as to the devisor's land in general.

THIS cause came on to be heard before the master of the rolls on the 13th of November, 1824, when his lordship was pleased to direct the following case to be sent for the opinion of the Court of Common Pleas:

James Willasey, by will dated the 10th of February, 1814, which [*430 was executed and attested so as to pass freeholds by devise, after devising an estate called Clifton to his son James in fee, gave and bequeathed to Nicholas Salisbury and Abraham Garnett, their heirs and assigns, all his plantation called Orchard estate, situate at Port Royal in Jamaica, with the slaves, stock, utensils, and appurtenances thereon or thereto belonging; and also all and singular his real estate and property whatsoever situate in Great Britain, the West Indies, or elsewhere, which he might die seized or possessed of, or in anywise interested in or entitled to in possession, reversion, remainder, or expectancy, not thereinbefore devised by him, with their appurtenances, to hold the same unto and to the use of them, N. Salisbury and A. Garnett, their heirs and assigns for ever, upon trust to sell the same in manner therein mentioned, and to convey and surrender the same unto or to the use or in trust for the purchaser or purchasers thereof; and as touching his personal estate, after payment of

his debts, funeral and testamentary charges, and the specific legacies therein bequeathed, the testator gave the same to them, his trustees, their executors, administrators, and assigns, upon the trusts therein mentioned; and he appointed N. Salisbury and A. Garnett executors of his will.

Some time after making the will, the testator sold Clifton; and in 1818 purchased and became legally seised in fee simple of a freehold estate called Allerton Hall.

On the 18th of November, 1819, the testator signed a codicil to his will, which was attested by two witnesses only, in the following words:

"Codicil to my last will, dated this 18th November, 1819. Clifton Hall being sold, it is my wish that the money so obtained shall go to the general fund to be *divided amongst all my children, and not to James only, as *431] the will directs. And also my late purchase of Allerton Hall to be sold, and the money so obtained to be equally divided amongst my children, share and share alike, as the will directs. And I give unto my wife Mary Willasey, in addition to what the will mentions, 300*l.* per annum for life. And I also appoint her an executrix jointly with the others named in my last will and testament. As witness my hand this 18th day of November, 1819."

On the 20th of September, 1823, the testator signed another codicil, which was also attested by two witnesses only; wherein, after revoking a legacy given by the will, and stating that one half of Orchard estate was sold, and giving directions concerning the sale of the other half, the testator proceeded as follows: "I now appoint Edward Lister of Everton, and the Reverend James Furnival of Upton, my executors, in the place of Nicholas Salisbury and A. Garnett within mentioned, with full power to act, &c. As witness my hand this 30th day of September, 1823."

On the 13th of February, 1824, the testator made another codicil, which was executed and attested as by law is required for passing freeholds by devise, in the following words: "I now appoint my friend the Reverend Benjamin Guest of Everton, near Liverpool, to be my executor, in the room of Edward Lister of Everton above mentioned, with full power to act, &c. Witness my hand this 13th day of February, 1824."

All the codicils were written on the same sheet, which was the back sheet of the will.

The testator died on the 17th of February, 1824. His widow survived him, but died before this case was passed.

The questions for the opinion of the court were,

*432] *First, Whether the third codicil operated as a republication of the will and first and second codicils, or any, and which of them?

Secondly, Whether the legal fee in the Allerton estate passed by the will and codicils, and to whom; or whether it descended to the heir at law of the testator?

The case was argued in Michaelmas term, 1824, but the certificate of the court was not signed till Hilary.

Pell, Serjt. The third codicil is a republication of the will and of the first and second codicils. There is some conflict between the earlier and later cases on this subject. Upon the whole, however, it seems to be a question of intention. The leading decisions are *Burns v. Crowe*, 1 Ves. jun. 486, 4 Br. Ch. R. 2, 1 Lucas, 96, and *Piggott v. Waller*, 7 Ves. jun. 118, in which it was holden that a codicil referring to the will passed after-purchased lands, though the codicil itself only related to personalty. In *Penphrase v. Lord Lansdowne*, Vin. Abr. *Devise*, Z. 22, and *Letton v. Lady Falkland*, ib., 2 Eq. Cas. Abr. 768, indeed, it was holden that a codicil would not operate as a republication of the will without a re-execution; but this was overruled in *Atcherley v. Vernon*, Vin. Abr. *Devise*, Z. 22, 1 Com. Rep. 381, 3 Br. P. C. 107, where it is laid down, that a codicil attested by three witnesses operates as a republi-

cation of a will of land. And though Sir W. GRANT was disposed to break in on the rule in *Piggott v. Waller*, he found himself bound to the cases of *Barnes v. Crowe*, and *Atcherley v. Vernon*. It is not necessary, therefore, that any particular intention to republish should appear. The codicil in *Piggott v. Waller* related only to personal property, and expressed no intention of republishing the will; and yet under a general devise of land in the will, it was holden to pass land acquired subsequently to the execution of *the [*433 will. In *The Attorney-General v. Downing*, Amb. 571, the mere annexation of a codicil was holden to be a republication. But in the present case the codicil is written on the same paper as the will; and unless there be an intention expressed to the contrary, as in *Bowes v. Bowes*, 2 B. & P. 500, (where the codicil devised the *said lands*, and the word *said* was considered to confine the operation of the codicil to those lands which would have passed under the will,) the codicil draws the will down to its own date in the very terms of the will, makes it operate as if it had then been executed in those terms, *Goodtitle v. Meredith*, 2 M. & S. 5, and gives the legal estate in the property devised to Benjamin Guest and James Furnival.

Bosanquet, Serjt., *contrà*. The third codicil has its full effect in the appointment of a new executor, and is not such a republication of the will as to pass after-purchased lands. The whole is a question of intention, and according to the cases, the party who contends that a codicil is not such a republication of the will as to pass after-purchased lands, must be able to show that there was no intention to pass them. But it may be fairly inferred that, if there is no reference to such lands, there is no intention to pass them. And there is no case of a codicil being deemed a republication of a will so as to pass after-purchased lands in which the codicil has not referred to them. Besides the cases which have been cited, there are many others in Serjt. Williams's note to *Duppa v. Mayo*, 2 Saund. 277 e, 4th edit.; and in *Doe, ex. dem. Pate v. Davy*, Cowp. 158, there is a clear reference to the will. Then, unless there be such reference, how can it be assumed the codicil means to affect after-purchased lands? Mere *annexation is no indication of any such intention; and attestation by three witnesses cannot of itself have any greater [*434 effect. For some time subsequently to the passing of the statute of frauds, it was holden that no lands could pass by any testamentary instrument unless attested by three witnesses; afterwards, it was holden that a codicil attested by three would give effect to a will insufficiently attested, if it expressly referred to that will; but it never was proposed that the attestation of a codicil by three witnesses should give effect to a will subsequently to the statute, unless it could have done so before; and it could not have done so before, unless by reference to the will it expressed an intention to do so. In 1 Roll. Abr. 618, it is laid down, "Si homme seisie de terre devise tout son terre a J. S. et puis purchase le manor de D. et puis escrie en son volunt que J. D. serra son executor, uncore ceo nest ascun novel publication a faire le manor de D. a passer." What more does this codicil contain than the addition of a new executor? If the expression, that "the codicil shall form part of the will," be made use of, as in *Piggott v. Waller*, that, according to all the cases, amounts to a republication; but there is no such expression here, and the principle ought not to be carried further, after the master of the rolls expressed, in *Piggott v. Waller*, the utmost reluctance to go to the extent to which he found himself bound by the authorities. If there had been no witnesses to the third codicil in the present case, it would have had no other effect than that of adding an executor; (for though the words are, "with power to act," &c., that can only mean to act as executor;) it could not have been a republication of the will so as to pass land; if so, how can the addition of witnesses effect such a republication? If the republication, by means of the codicil, is to bring the will down to the date of the codicil, that of itself would be an argument against the republication in the

*435] *present instance; for the greatest absurdity would ensue. Salisbury and Garnett, who, by the codicil, are removed from the office of executors and trustees, would, by the republication of the will at the date of the codicil, take a fee in the lands devised by the will; and if they are not to take also the subsequently purchased lands, it is difficult to say in whom they would vest, for neither the second nor third codicils refer to the first. But though the third codicil should not be deemed a republication of the will so as to pass after-purchased lands, it will not be inoperative, for the appointment of the new executor will stand good. [BEST, C. J. If a codicil, which refers to a will only in respect of personal property, should be holden, as in *Piggott v. Waller*, to be a republication of the will as to real property, why should not the same effect be produced by a codicil which appoints executors to manage the personal property?] The passage in Rolfe's Abridgment seems to be an answer to that difficulty; and in *Piggott v. Waller*, the codicil was expressly ordered to be "part of the will." But unless where it becomes part of the will, or expressly refers to it, the strongest presumption of intention on the part of the testator does not suffice to pass after-purchased property; *Bowes v. Bowes*, 2 B. & P. 500; *Parker v. Biscoe*, 3 B. M. 25; although it is true, that in order to prevent a codicil from being a republication, an intention to that effect must equally appear.

Pell. It is impossible to collect any intention contrary to republication from the language of the present codicil; and from the case of *Barnes v. Crowe*, it is clear that no particular form of words is required to make a codicil operate as a republication. In that case the passage in Rolfe's Abridgment was expressly brought to the notice of *the court. It is true the third codicil does not immediately refer to the first, but it refers to it through the second; and if the first and second were struck out, no construction could be put on the third, because Lister's name does not appear in the will.

The following certificate was sent in Hilary term:

We have heard this case argued by counsel, and considered it, and are of opinion,

That the third codicil operated as a republication of the will and of the second codicil.

Upon the question, whether it also operated as a republication of the first codicil, there may be some doubt; but as the republication of the will passes the Allerton estate on the same trusts as the first codicil if properly executed would have done, it is perhaps of little or no importance to consider that question farther.

We are of opinion that the legal fee in the Allerton estate passed by the will so republished to Nicholas Salisbury and Abraham Garnett, the devisees named in the will.

W. D. BEST,
J. A. PARK,
J. BURROUGH,
S. GASELEE.

*437]

*SEAMAN v. PRICE.

Plaintiff having orally bargained with J. E. for the sale of some houses, sold the bargain to defendant for 40*l.*; and J. E., at the request of the defendant, conveyed the premises to P., who was not a trustee for defendant.

A verdict having been found for the plaintiff in action for the recovery of this 40*l.*, the court refused to enter a nonsuit, which was moved for on the grounds, first, that the oral bargain for the interest in the houses could never have been enforced, and therefore could not form the consideration of an assumpsit; secondly, that the houses had never been conveyed to the defendant.

ASSUMPSIT. First count stated that plaintiff had bargained and agreed with
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one J. E. for the purchase of three freehold houses, to be conveyed to the plaintiff, at the price of 600*l.*, and that in consideration the plaintiff would sell and give up to the defendant the said bargain, and would suffer and permit the defendant to become the purchaser of the houses from J. E. instead of the plaintiff, he, the defendant, undertook, &c., to pay the plaintiff for the said bargain 40*l.*; that the plaintiff did sell and give up the bargain to the defendant, and did suffer and permit the defendant to become the purchaser of the houses from J. E., and the defendant did accordingly become such purchaser, and did take the said bargain, and did obtain conveyance to him of the houses on the terms aforesaid, &c.

Second count stated the consideration that plaintiff would suffer, permit, and procure the defendant to become the purchaser, and averred that the plaintiff did suffer, &c., and that defendant was accepted, and became the purchaser, &c.

The last count stated the consideration, that plaintiff would relinquish and give up the said bargain to the defendant, and would give and afford to the defendant the opportunity of becoming the purchaser; and averred that plaintiff did relinquish and give up, and did give *and afford to the defendant the opportunity of becoming purchaser. [438]

It appeared in evidence at the trial, London sittings after Michaelmas term last, that the plaintiff had orally agreed with Joel Emmanuel, the owner of the houses, for the purchase of them at 600*l.*, and that the plaintiff had, in writing, agreed with the defendant to sell him the bargain for 40*l.* Upon the request of the plaintiff, J. E. conveyed the premises, under the direction of the defendant, to a Mrs. Price, but not in trust for the defendant. J. E. stated that he would not have conveyed to the person named by the defendant but for the request of the plaintiff, to whom he held himself bound by his contract.

Upon this evidence it was objected by *Pell*, Serjt., on two grounds, that the action was not sustainable: first, because the bargain between plaintiff and J. E. not being in writing, was void under the statute of frauds, and therefore the transfer of it to the defendant could form no good consideration for the defendant's promise, inasmuch as it could not be legally enforced against J. E. Secondly, because the averment of defendant's having become the purchaser was not proved; the legal conveyance being to Mrs. Price, who was not even a trustee for the defendant.

Best, C. J., thought that all the counts were supported. But a verdict having been taken for the plaintiff, with leave to the defendant to move to enter a nonsuit,

Pell, Serjt., now moved to that effect, on the grounds urged at the trial; the Court, however, refused the rule, and in giving judgment,

Best, C. J., said, the inclination of my opinion at the trial was as it is now, that all the counts of this *declaration are supported; but it is unnecessary to decide that now, as the last count is clearly proved. Beyond all [439] question the defendant has had the opportunity of becoming the purchaser, the premises having been conveyed to his nominee; and though there was no legal obligation in Emmanuel to convey, yet the defendant has, in fact, enjoyed all the advantages of this agreement, and that forms a moral obligation sufficient to support the promise.

The other judges concurred; and *Pell*

Took nothing.

DIXON and Others, Assignees of MOORE, a Bankrupt, v. HATFIELD.

W. undertook to complete the carpenters' work in H.'s house and find all materials; W. being delayed for want of credit or funds to procure timber, it was supplied by M. on H.'s signing the following undertaking.

"I agree to pay M. for timber to house in A. C., out of the money that I have to pay W. provided W.'s work is completed:"

Held, that this was not a guarantee to pay if W. should fail, but a direct undertaking to pay when the work should be completed.

ASSUMPSIT on the following agreement.

"I, Richard Hatfield, do agree to pay Mr. J. Moore 50*l.* for timber to house in Annett's Crescent, out of the money that I have to pay William West, provided West's work is completed."

At the trial before *BEST*, C. J., London sittings after Michaelmas term last, it appeared that West had undertaken, for a certain sum, to complete the carpenters' work in the house in question, and find all the materials; but being delayed for want of credit or funds to procure timber, it was supplied by Moore, upon the defendant's signing the above agreement.

*440] *The jury being satisfied with respect to the completion of the work, found a verdict for the plaintiff for 50*l.*

Vaughan, Serjt., moved for a rule nisi to set aside this verdict, and enter a nonsuit, upon the ground, among other objections, that the agreement on which the action was brought was in effect a guarantee to pay Moore, in case West failed to pay him; and that if it was a guarantee, the consideration for the defendant's undertaking was not sufficiently expressed.

But the Court were clear that this was not a collateral but a direct undertaking; and the chief justice stating that the jury had expressed themselves satisfied with respect to the completion of the work, the rule was

Refused.

PRATT v. ODDY.

Bail.—Notice of justification.

IN the above, and four other causes, notice of justification of bail had been given for a dies non, without any continuance of notice to the ensuing day. The Court on ascertaining that the Court of K. B. permitted the bail under such a notice to justify on the next day, without a continuance of notice, (which continuance is the practice in this court,) now ordered that the bail in the above causes might justify to-morrow; and that the rule for serving notice before three in the afternoon, might, in this instance only, be dispensed with.

*441] *ROGERS, Administratrix of ROGERS, v. KINGSTON and Another.

The creditor of an insolvent withdrew his opposition, after stipulating for and receiving a promissory note for the amount of his debt.

The insolvent, after his discharge, was arrested for non-payment of this promissory note, but settled the action by giving a warrant of attorney, in which his brother joined him, to confess a judgment for the debt, costs, and interest, to be paid by instalments.

The court, on motion, set aside this warrant of attorney, after payment of the first instalment.

THE defendant was a discharged insolvent. When he made his application to the Insolvent Debtor's Court, the plaintiff's intestate entered an opposition against the defendant's discharge, for a debt of 30*l.* for money lent, which opposition he withdrew, after stipulating for and receiving a promissory note for 30*l.*, payable by instalments. In July, 1824, the defendant was arrested for this 30*l.*, but settled the action by giving a warrant of attorney, in which his brother joined him, to confess a judgment for the debt, costs, and interest, to be paid by instalments.

The first instalment he paid on the 10th of January last.

Peake, Serjt., obtained a rule, calling on the plaintiff to show cause, why this warrant of attorney should not be set aside, and the instalment of the 10th of January be returned to the defendant, upon the ground that the whole transac-

tion was contrary to the policy of the Insolvent Debtor's Act; he relied on *Jackson v. Davison*, 4 B. & A. 691.

Wilde, Serjt., now showed cause. The ground of decision in the case referred to was, that the creditor had for his individual benefit diminished the creditors' general fund, contrary to the spirit of 17th, 18th, 19th, 25th, and 28th sections of 1 Geo. 4, c. 119. But though *such a course could not be pursued under the bankrupt laws, or under a general trust deed [*442 for the benefit of creditors, there seems to be no sufficient reason for assuming it to be a violation of the policy of the Insolvent Debtor's Act, since that act is so framed as to give every creditor the means of enforcing, to a certain extent, the payment of his individual debt; (for that the imprisonment authorized by the act is intended to operate for the benefit of the creditor, and not as a mere punishment, is clear from this circumstance, that upon payment or release of the debt in respect of which the imprisonment has been ordered, the prisoner is discharged;) the argument with respect to the diminution of the fund, cannot apply to a claim made against a surety, nor ought it to avail when urged by the debtor himself, whatever effect it may be allowed to have when proceeding from his creditors at large. At all events, it comes too late on the present occasion. It ought to have been made, if at all, at the time of the action on the promissory note; but the debtor being at least under a moral obligation to pay that note, there was a good consideration for the warrant of attorney. In a case so doubtful the court will not decide summarily on a motion like the present.

BEST, C. J. This is an application to set aside a warrant of attorney, not an application to stay proceedings in an action; we do not, therefore, by acceding to the present application, prevent the plaintiff from trying before a different tribunal the question now in dispute; nor does this application, as it has been contended, come too late; it is never too late to apply to the court in transactions tainted by fraud. In the present instance there is a suggestion of fraud, and the warrant of attorney was given under circumstances *clearly not [*443 justifiable. I cannot distinguish this transaction from the case of a note given for an usurious consideration, the maker of which afterwards gives a warrant of attorney to enter up judgment for the same demand; such a warrant the court would set aside, because no subsequent arrangement can render that legal, which was in its origin illegal; and the decision in the Court of King's Bench is binding on us, unless it be shown that it was erroneously determined. It has been alleged, indeed, that upon the occasion of that decision, the attention of the court was not called to all the sections of the act. I cannot see that any section applies to the case except the 25th, and to that the attention of BAYLEY, J., was particularly directed: but independently of that case, the court would accede to the present application. It has been argued, that an insolvent has a right to beg off a creditor, and that a creditor may forbear to insist on his debt; but it is immoral for him to *sell* his forbearance, and thereby to place himself in a better situation than the other creditors; it is a fraud upon them, and contrary to the policy of the law. This has long been established as to cases where debtors have entered into a composition with their creditors; and it is equally fraudulent to buy off the opposing creditor of an insolvent, because under the 25th section of the act, the commissioners may issue execution against the insolvent's subsequently acquired effects, and pay his old debts; but they must first pay those which have been newly contracted, and the party who has obtained this warrant of attorney places himself by the sale of his forbearance, in the situation of a new creditor, and in a better situation than he is entitled to claim. By pretending to oppose, he possibly prevented others from taking the same step, and he cannot be allowed to relinquish his opposition for a warrant squeezed out of the necessities of the insolvent. This is clearly distinguishable from the case of a party *who makes a new promise when he is clear and sui juris, and where the new promise would lay him under a moral [*444

obligation, which he would be bound to fulfil; but if the new promise be the price of a consent to withdraw an opposition, no moral consideration can arise; the whole transaction is a trick and fraud between the two parties to cheat the other creditors, and the rule which prays to set it aside must be made absolute.

PARK, J. The argument which has been urged in support of this warrant of attorney, is in opposition to all the cases which have been decided from that of *Jackson v. Duchaire*, 3 T. R. 551, downwards. The general principle of all those cases is, that one creditor shall not be permitted to obtain an advantage at the expense of the others. But the case turns on the 25th section of the Insolvent Debtor's Act, which gives the commissioners power to issue an execution against the insolvent's subsequently acquired effects, and divide them rateably among the creditors; but as the plaintiff's name was not inserted in the schedule, he might sue out execution without application to the commissioners, and thereby obtain an advantage over the rest of the creditors. The 26th section of the act provides, that the insolvent shall not be arrested for a debt due to a former creditor, and if the plaintiff's name had been inserted in the schedule, the insolvent's person would have been safe; this the plaintiff prevents by taking a promissory note, contrary to the policy of the act. The case in the King's Bench proceeds on the true ground, and is in point for the defendant.

BURROUGH, J., and GASELEE, J., concurring,

The rule was made absolute.

*445] *SHORT, Assignee of the Sheriff of LINCOLNSHIRE,
v. HUBBARD and Others.

The court refused to set aside, on motion, an execution in an action on a replevin bond, upon an objection to the proceedings, which might have been taken before judgment.

ON the 7th of April, 1824, the plaintiff distrained on Hubbard for 4*l.* 17*s.* 6*d.*, half a year's rent, due to plaintiff, as trustee under the will of Ann Grant-ham. Goods were taken, and specified in the notice of distress to the value of 1*l.*

On the 8th, Hubbard executed a replevin bond for 100*l.*, in the condition of which these goods were enumerated, and thereupon obtained a warrant for replevying them.

On the 9th, the plaintiff gave Hubbard notice that the above distress was abandoned, and made a second distress for 50*l.*, being five years' rent-charge due to the plaintiff, as trustee under the above-mentioned will, and the notice of distress specified the goods taken under the former distress, together with some others.

But under the warrant of replevy the goods taken upon the first distress were redelivered to Hubbard, and no further proceedings were taken on the second distress.

A plaint was entered on behalf of Hubbard at the first county court after the execution of the replevin bond, which plaint Short removed into this court by re. fa. lo.

Hubbard having omitted to enter an appearance, Short took an assignment of the replevin bond, sued on it, and having obtained judgment on demurrer, issued a fi. fa., on which he levied 50*l.*, as arrears of rent alleged to be due at *446] the time of making the distress, besides 35*l.* 12*s.* *taxed costs of the action, costs of distress, re. fa. lo., judgment, and fi. fa.

Vaughan, Serjt., upon affidavit of these facts, had obtained a rule nisi for setting aside this execution as irregular, upon the ground that the bond was given for the prosecution of a replevin on a distress made, for an alleged arrear of only 4*l.* 17*s.* 6*d.* rent, and not on the subsequent distress for the alleged arrear of 50*l.*; and that, therefore, the plaintiff was not entitled under the execution to levy for any other rent than 4*l.* 17*s.* 6*d.*

Taddy, Serjt., who showed cause, relied on the clear law, that a party may distress for one rent, and avow for another; (a) but

Vaughan insisted that this could not apply to cases where, as in the present instance, the first distress on which the bond was given, had expressly been abandoned; so that in fact the plaint in that distress need never have been proceeded in, and there was nothing to which the bond applied.

The Court, however, thought, that with whatever effect this might have been urged as a ground for setting aside the proceedings at an earlier stage, it did not authorize them to disturb an execution warranted by a regular judgment, and accordingly the rule was

Discharged.

(a) *Bac. Abr. Replevin, K.*; *Gwinnett v. Phillips*, 3 T. R. 645; *Crowther v. Ramsbottom*, 7 T. R. 658; *Eiherton v. Popplewell*, 1 East, 142.

*MOODY and CATHERINE his Wife v. KING.

[*447]

Devise of all my houses and lands to W. F. and his heirs forever, (charged with an annuity :) and if W. F. should have no issue, the said estate is, on the decease of W. F., to become the property of the heir at law, subject to such legacies as W. F. may leave to the younger branches of the family.

W. F., who was seized under the will, and married, having died without issue: *Held*, that the property was subject to dower for his widow.

On the 4th March, 1802, William Frost the younger and Catherine Moody, the female plaintiff, intermarried. C. Moody continued the wife of W. Frost till his death. William Frost the elder, the father of W. F. the younger, was, at the time of making his will, and continued thereafter till the time of his death, seised in fee-simple of the manor of Brinkley, otherwise Brinkley Hall, in the parishes of Brinkley, Weston, Willingham, and Carlton, in the county of Cambridge, and of divers houses and lands in the same parishes.

On the 6th of April, 1805, W. F. the elder duly made and published his last will and testament in writing, executed and attested, to pass freehold estates, in the words following: "I, W. F., give and bequeath to my son W. F. and his heirs forever, all my houses and lands, with all their appurtenances thereunto belonging; also I give to my well-beloved wife, Rebecca Frost, the sum of 100*l.*, of good and lawful money, yearly and every year during her natural life, to be paid her by the aforesaid W. F. half-yearly out of the estate; and if the said W. F. should have no children, child, or issue, the said estate is, on the decease of the said W. F., to become the property of the heir at law, subject to such legacies as he the said W. F. may leave by will to any of the younger branches of the family."

W. F. did not revoke nor alter his said will, and died on the 25th August, 1807, leaving Rebecca his wife, since deceased, and W. F. the younger, the devisee, him surviving; and upon the death of W. F. the elder, W. F. the younger took possession of the manor, houses, *and lands so devised to him, and continued seised thereof or of part thereof, and of land allotted [*448 to W. F. the younger by the commissioners under an act of parliament for enclosing the parish of Brinkley, in lieu of the remainder thereof, under the will, till his death. On or about the 26th October, 1818, W. F. the younger died, and left C. Moody his widow and Rebecca, the wife of Robert King, his heiress at law him surviving. The manor, houses, and lands were subject to one or more long term or terms of years, created by W. F. the elder, or some former owner thereof, which were at the time of argument vested in some person, in trust for the persons entitled to the inheritance.

After the death of W. F. the younger, Robert King and his wife obtained a verdict in an action of ejectment, which they brought against C. Moody, then

C. Frost, widow, and in June, 1820, they were put into possession of the said manor and other hereditaments devised.

In Trinity term, 1 G. 4, King and his wife conveyed the estates by fine, to Robert William King, the defendant in fee-simple.

The plaintiffs intermarried in 1821, and filed their bill in chancery, for a discovery and an account of the rents and profits of the estates, and to have dower assigned thereout to C. Moody, as the widow of W. F. the younger.

To this bill the defendant filed a demurrer.

On the 12th May, 1824, the demurrer came on to be heard before the vice-chancellor, when he directed the above case to be stated for the opinion of the Court of Common Pleas upon the question,

Whether the plaintiff, Catherine, was entitled to dower out of the estate which W. F. the younger took in the hereditaments mentioned in the will of his father, W. F. the elder? And now,

*449] *Wilde*, Serjt., for the plaintiffs, relied on the case of *Buckworth v. Thirkell*, 3 B. & P. 652, note, and the authorities there cited, as decisive of the question, and not distinguishable from the present case. *Buckworth v. Thirkell* had been confirmed by the decision in *Goodenough v. Goodenough*, as referred to in Mr. Preston's work on abstracts, vol. iii. 372.

Cross, Serjt., contra, after referring to Mr. Butler's note on the subject, at 241 Co. Lit., argued, that William Frost the younger took the land, subject to a condition which was to determine the fee; and that the fee having determined pursuant to this condition, there was no longer any estate on which the claim to dower could attach. The estate which the defendant took never was the estate of William Frost the younger, and it was only out of his estate that the plaintiff could be dowable. [BEST, C. J. Suppose an estate tail to A., remainder in tail to B.:—on failure of issue by A., B. takes a new estate, and yet it would be subject to dower for the widow of A.] That is the only case of a new estate on which dower would attach; it is an exception to the general rule, for which exception there are reasons which do not apply to the present case. The estate which W. Frost the younger took is a new species of inheritance not known to the common law, and which has never been expressly held to be subject to dower; for the case of *Buckworth v. Thirkell* is a case touching courtesy, and has not been esteemed an authority of the highest order. The wife is dowable only where the whole inheritance was at the husband's disposal; but under the statute de donis a tenant in tail has always the power to make the property absolutely his own, by means of a fine and recovery, and to defeat the succeeding estate. W. Frost's interest, therefore, was very different from that of a

*450] both of which estates the tenant in possession had the power of making absolute, and of defeating any remainder: W. Frost had only an estate upon condition, and could in no wise affect the estate in remainder. But dower out of an estate tail is of itself an exception from a general rule, and exceptions are barren and cannot be applied to other cases; the policy of the law, too, is at present unfavourable to any extension of the incident of dower. In *Ray v. Pung*, 5 B. & A. 561, in which all the authorities on the subject were examined, it was holden that an estate in fee to the use of A. B. *until appointment*, was not subject, after appointment, to dower for the widow of A. B. In like manner W. Frost's estate in fee ought not to be subject to dower for his widow, after the determination of the estate, by his dying without issue. In the present case, too, there is an outstanding term; so that if she obtains judgment of dower, it must be with a cesser executio.

Wilde, in reply. The power which a tenant in tail has to convert his estate into a fee is an accident of the estate, and not the cause of dower, which attaches because the husband has once been seised of the inheritance; the case of an estate tail, therefore, is strictly analogous to the present. *Ray v. Pung* only

shows that a purchaser under an appointment takes by virtue of the original deed of conveyance, which by giving the estate at once to the purchaser, pretermits the intermediate appointor, leaving nothing on his part to which the right of dower can attach. *Buckworth v. Thirkell* is referred to by HOLROYD, J., in *Doe v. Timins*, 1 B. & A. 549, as a case of authority.

*BEST, C. J. Lord ALVANLY does not seem to approve the decision of Lord MANSFIELD in *Buckworth v. Thirkell*; and according to his [*451] lordship's account of it, the case *made a noise* in Westminster Hall at the time the judgment was given. The great respect I feel for Lord ALVANLY and the bar, is such as to make me pause before I make up my mind as to the certificate that should be sent to the vice-chancellor. I must, however, be permitted to say, that after a decision of the Court of King's Bench, which was much considered before it was pronounced, has remained unimpeached for more than forty years, and has been confirmed by the case of *Goodenough v. Goodenough*, we ought not to overturn it, unless it establishes a rule productive of injustice and inconvenience. Whatever conveyancers might have thought of the case when it was first decided, they have since considered it as having settled the law, and it would be productive of much confusion to unsettle it again. A woman by marriage not only surrenders to her husband the personal property of which she is then possessed, and profits of her real property, but also her capacity of acquiring property during her coverture; she has, therefore, an equitable claim to a provision out of her husband's property on his death. Before trusts were introduced, and real estates were devisable, dower was the only mode by which a provision could be made for a married woman: if the husband did not especially endow her at the time of marriage, as by dower ad ostium ecclesiæ, the law in its justice gave her a third of the estate of which he died seised, for her life. A more suitable maintenance may now be secured to her by settlement; but if the husband omits to make a settlement, or the parties were at the time of the marriage poor, and afterwards by industry or good fortune he acquires an estate, she, whose fate is united to his for worse and better, cannot have a proper allowance better secured to her, if the *husband [*452] should be indisposed to do what is just, than by the law of dower.

If there is any right that ought to be favoured in a court of justice, it is the widow's right to an independent maintenance: but this right is to be attempted to be got rid of by a technical argument, by a mere quibble on words. It is admitted, that when an estate in fee is given to a man if he has children, his wife will be entitled to dower, although he has no child; but it is insisted, that if an estate in fee be given him *without* any such condition, and it is afterwards added, that if he has no children at the time of his death then the estate shall go to A. B., his wife is not dowable. This distinction is unworthy of a science which is to settle equitably the rights of the subjects of this country. The rule of law, as given us by Littleton, is simple and just. (Sec. 53.) "When the husband is seised of such an estate in tenements, &c., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband of such tenements; she shall have her dower, otherwise not."

The children of William Frost must have inherited an estate in fee-simple indefeasible, had any survived him, and the executory devise would have been at an end: the case of his widow comes within the rule in Littleton. It would be a strange anomaly, that the widow of one whose issue can only be tenants in tail, should be dowable; and she whose children would be tenants in fee by inheritance from their father, should not. It has been said at the bar, that the widows of tenants in tail were dowable, because such tenants might enlarge their estates into fee-simple. This cannot be the reason, because from the time of the passing the statute *de donis* until the introduction of recoveries, which

*453] was not earlier than Edward the 3d, or, as some say, than *Edward the 4th, estates tail could not be enlarged. There is no doubt, also, that when estates in fee-simple conditional were first introduced, they were perpetual entails, and yet the wives of the tenants were dowable.

It has been said at the bar, that if you hold that Catherine Moody is entitled to dower, you must take it out of the estate of the person who has the executory devise, to whom she is a perfect stranger: this is not so; dower is part of the estate of the husband, as it is a part of tenant in tail's estate, who dies without issue, and not of that of the remainder man.

The following certificate was afterwards sent:

We have heard this case argued by counsel, and are of opinion, that the plaintiff, Catherine, is at law entitled to dower out of the estate which the said William Frost the younger took in the hereditaments mentioned under the said will of his father, William Frost the elder, with a cesset executio during the terms.

W. D. BEST,
J. A. PARK,
J. BURROUGH,
S. GASELEE.

THOMAS v. JACKSON.

An application to strike out unnecessary counts should be made before they are engrossed on record.

THE declaration upon a slander contained thirty-three counts, many of them varying only in an immaterial word or two from the others, and many of them stating only words not actionable.

Vaughan, Serjt., obtained a rule nisi for striking out several of these counts as unnecessary;

*454] *Bosanquet*, Serjt., showed cause, on the ground that the application came too late. The plaintiff had declared with brevity in Michaelmas term, 1823. In Hilary term, 1824, the defendant pleaded a justification, when the plaintiff obtained leave to amend, not adding any new cause of action, and delivered a declaration of thirty counts. In Trinity term, 1824, the defendant pleaded again nearly the same pleas as before. The plaintiff took issue on the pleas and gave notice for trial at the ensuing assizes, when he entered the cause, but afterwards withdrew the record.

In Michaelmas term last defendant obtained a rule nisi for judgment as in case of a nonsuit, which was discharged, on a peremptory undertaking to try at the next assizes.

In January, 1825, the plaintiff obtained an order to amend his declaration, by adding three more counts, and the defendant had a rule to plead *de novo*, which expired before he pleaded again.

Bosanquet now offered to strike out any of the counts, upon the defendant's undertaking not to take any advantage, if at the trial they should be found necessary; but this offer was rejected, and

Vaughan contended, that after the rule to plead *de novo*, the defendant was in the same situation as if he had made this application when the declaration was first delivered.

The Court, however, thought otherwise; and considering that the object of applications to strike out unnecessary counts was to save the expense of having them engrossed on record, they held, that under the above circumstances, the present application came too late, and

Discharged the rule with costs

*WEST and Another, Assignees of PRICE, a Bankrupt,
v. PRYCE.

[*455]

The costs of judgment as in case of a nonsuit, entered up against the plaintiff after he has become bankrupt, cannot be set off against the costs of an action by the bankrupt's assignees against the defendant in the former action.

On the 27th of November last, judgment as in case of a nonsuit, was entered up, in an action which had been commenced by the bankrupt before his bankruptcy, against the defendant, and in which, after having withdrawn the record at a previous sittings, he had on the 10th of November obtained time to enter the issue.

On the 22d of the same month he became a bankrupt.

At a sittings in this term the bankrupt's assignees obtained a verdict in the present action.

The defendant's costs in the former action not having been paid,

Pell, Serjt., had obtained a rule nisi to set them off against the costs in this action, and

Vaughan, Serjt., was to have shown cause, but the court called on *Pell* to support his rule. He urged that these costs were provable under the bankrupt's commission (*Watts v. Hunt*, 1 B. & P. 134;) and, therefore, ought to be set off against any claim made by the assignees against the defendant, especially as it was through the bankrupt's own delay that the judgment as in case of a nonsuit, had been retarded to a period subsequent to the bankruptcy.

But the Court, though they expressed themselves willing to carry the practice of setting off costs as far as it could possibly be allowed, thought that this was a case to which they were not warranted in extending it, either by precedent or justice: that whether the costs of the nonsuit were or were not provable under the bankrupt's commission, there was no mutual credit between the defendant and the bankrupt's assignees, nor were the parties in the two actions the same; they therefore

Discharged the rule.

PRESS v. PARKER.

Devise to R. P. of "all my freehold messuage, wherein he now lives," and to A. P. of "all my freehold messuage now in the occupation of E."

A coal cellar within the boundary of the messuage in the occupation of E. had always been used, and was, at the time of the will, enjoyed with the messuage in which R. P. lived: *Held*, that evidence might be given of that fact, and that the coal cellar passed to R. P.

TRESPASS for breaking into a closet and coal cellar, which the plaintiff and defendant both claimed under the will of William Press, the plaintiff's father.

The several devises were as follows: "I give and devise to my eldest son Robert Press, (the plaintiff,) all that my freehold messuage or tenement situate in the parish of the Holy Trinity, in Cambridge, *wherein he now lives*, with the yard, back estate and premises thereto belonging, part of which is now in my own occupation, and other part thereof is in the occupation of Mr. Chapel and Mr. Moore, to hold the said messuage or tenement, hereditament, and premises, with the appurtenances thereunto belonging, unto my said son, his heirs, and assigns.

"Also I give and devise unto my eldest daughter Ann Parker, (wife of defendant,) all that my freehold front messuage or tenement in King-street, in the said parish of the Holy Trinity, with the appurtenances thereto belonging, *now in the occupation of ——— Edwards*, with a right of way and passage, from time to time, and at all times, into, out of, and from the yard adjoining to the same, and the use of the pump and *privy being in the said yard. To hold the said messuage or tenement, and hereditaments with the appurte- [*457]

nances thereunto belonging, unto my said daughter for and during her natural life."

At the trial of the cause before the chief baron, Cambridge Summer assizes, 1824, it appeared, that plaintiff and defendant's houses joined each other, the devisor having purchased the premises in 1791, and having built the house occupied by the defendant.

From the year 1791, till within about five years previous to the trial, the plaintiff's house had been occupied by the devisor, and from that time to the present by the plaintiff; during the whole period, the devisor and the plaintiff had occupied the coal cellar in question, to which, though it was within the boundary of the defendant's house, there was no approach but on the plaintiff's side.

The defendant was about to call witnesses to show that the coal cellar was within the ambit of his house, but the chief baron said such testimony would be useless, because, admitting the fact, he thought that the will would pass to the plaintiff whatever was in his occupation at the time of publishing the will; and he told the jury, that the only question for them was the fact of occupation.

A verdict having been found for the plaintiff, *Wilde*, Serjt., obtained a rule nisi for a new trial, on the ground that the defendant's witnesses had been improperly excluded, and that the direction to the jury was wrong.

Taddy, Serjt., was now to have shown cause, but the court called on *Wilde* to support his rule. He urged,

That the statement in the will with regard to occupation, was only matter of description, and that no more passed than belonged to the freehold; whether *458] the coal cellar was parcel of the freehold was a question of law, depending on the point whether or not it was within the boundary of the freehold, and not a matter of fact depending on the mere circumstance of occupation; that a reference to the occupation at the time of the will would not limit or extend the amount of the devise; *Paul v. Paul*, 1 W. Bl. 255; *Goodtitle v. Southern*, 1 M. & S. 299; *Doe dem. Browne v. Greening*, 3 M. & S. 171; *Down v. Down*, 7 Taunt. 343; and that separation or union of enjoyment was not a pregnant fact from which the court could determine what was intended to pass by the devise.

Bzrr, C. J. If I felt that the judgment which I am now about to pronounce could interfere with any of the cases which have been cited on the part of the defendant, I should pause before I came to a determination on this question; but there is not one of them which can be considered at variance with the plaintiff's claim. In *Doe dem. Browne v. Greening*, the testator devised all his estate "in any lands, tenements, and hereditaments at Coscomb." The question was the same as in *Doe dem. Chichester v. Oxenden*, 3 Taunt. 147. In both cases there was a local description of property, by which it was clear that the testator intended nothing to pass which was out of the boundary of the description, and all that the court decided, was, that evidence should not be admitted to give a different sense to a word properly denoting local description. In *Paul v. Paul*, where one had devised lands by the description of his farm at Bevington, in the tenure and occupation of J. S., in whose lease there was an exception of the woods and timber, it was held by Lord MANSFIELD that the woods and timber passed under the will, the words, "in the tenure and occupation of J. S.," being only words of additional description, after *459] the property had been sufficiently designated by the words, "at Bevington." In *Down v. Down*, the question was, whether land which had been separated from a farm for the convenience of the lessor, would pass under a devise of the farm. In that case, the lease was of itself the strongest evidence to show of what the farm consisted; for the land in dispute was excepted; which proved that, but for the exception, it would have passed under a demise of the farm. *Goodtitle v. Southern* is a decision adverse to the defendant. The devise there,

was, of "all my farm, called Trogues Farm, now in the occupation of A. Clay;" and evidence was admitted to show that the testator had, in a notice to quit, applied the name of Trogues Farm to two other closes besides those which were in the possession of A. Clay. Lord ELLENBOROUGH says, "Parcel or no parcel is always a question of evidence for a jury; and in the same manner it was competent to show here, if there was any doubt, that the two closes were parcel of Trogues Farm, by which name the thing devised was sufficiently ascertained. The testator certainly contemplated these closes as parcel of Trogues Farm when he gave the notice to quit. That is clearly an exposition of the description which he used in his will. As to the argument, that the words of the devise are satisfied by applying them to the farm in Clay's occupation, and therefore cannot be extended to the closes in question; it may be answered, that if these closes were parcel of Trogues Farm, the word 'all' in the devise would not be satisfied without including them. The testator was mistaken as to the person in whose occupation the two closes were; but the devise is sufficiently comprehensive: it is clear that he meant to pass all which was called Trogues Farm, which is a plain and certain description; and that the defective description of the occupation will not alter the devise." It was holden, therefore, to be entirely a question of evidence; "and evidence has been let in here, to show the state of the property at the time of the devise, [*460 which was the real point to be determined. If the second devise had stood alone, the words, "all my freehold tenement in the occupation of Edwards" might have carried the whole dwelling, and "the occupation of Edwards" have been deemed mere words of description. But we must look to the whole will, and the situation of the testator at the time of making it, and then the evidence which has been admitted becomes of the utmost importance. The testator, who was owner of both the houses, was entitled to divide them as he pleased. In the first clause of the will, he says, "I give and devise to my eldest son Robert Press, (the plaintiff,) all that my freehold messuage or tenement, situate in the parish of the Holy Trinity, in Cambridge, *wherein he now lives*, with the yard, back estate, and premises thereto belonging, part of which is now in my own occupation, and other part thereof is in the occupation of Mr. Chapel and Mr. Moore, to hold the said messuage or tenement, hereditaments and premises, with the appurtenances thereunto belonging, unto my said son, his heirs and assigns." If we stop here, and find that the devisee and testator, when in possession of the house, had used the coal cellar, no one can doubt that it was intended the coal cellar should pass. But he goes on and devises, "Also I give and devise unto my eldest daughter Ann Parker, (wife of defendant,) all that my freehold front messuage or tenements in King-street, in the said parish of the Holy Trinity, with the appurtenances thereto belonging, now in the occupation of ——— Edwards, with a right of way and passage from time to time, and at all times unto, out of, and from the yard adjoining to the same, and the use of the pump and privy being in the said yard. To hold the said messuage or tenement, and hereditaments, with the "appurtenances thereunto belonging, unto my said daughter for and during her natural life." Now, [*461 where two clauses in a will are utterly inconsistent the one with the other, in general, the latter of the two must prevail; but the court must make both clauses available wherever it is possible to do so, and here the court can do so, if the words, "now in the occupation of Edwards," are any thing more than mere words of description. Take them as words of quantity, and the two clauses are clear and reconcilable. But there are other words which clearly show that the testator did not consider he had given the whole house, but only that part of it occupied by Edwards, for he has specified the right of way into the yard, and the use of the pump and privy there, all of which would have passed by the larger words, had it not been clear that he proposed to employ them in a confined sense. The testator was fully aware of what he was doing, and

intended the plaintiff's house should be taken as he had been accustomed to enjoy it. With the assistance of the evidence, the latent ambiguity is removed, and it clearly appears that the coal-cellar was to go with the plaintiff's house, and not with that occupied by Edwards.

BURROUGH, J.(a) It having been admitted that the cellar in question was within the boundary of the defendant's house, there is no ground for complaining that evidence on that point has been improperly rejected. At the time of making the will, the testator had divided the property in question, of which he describes one part as being in his own and the plaintiff's occupation, and the other in the occupation of Edwards, and he clearly intended to dispose of it in *462] the way it was then occupied. *The description of the second tenement shows to demonstration that this was his intention.

GASELEE, J. The case of *Doe dem. Clements v. Collins*, 2 T. R. 498, very much resembles the present. There, the testator, who was tenant for years, of a house, garden, stables, and coal-pen, bequeathed "the house I live in, and garden, to H. Clements:" and it was holden the stables and coal-pen passed. ASHHURST, J., said, "the testator's intention appears to have been to give, by the bequest of his house, every thing which was in his occupation, as proper and convenient for the occupation of the house." He certainly says, he should have doubted as to the coal-pen if it had been proved to have been ever annexed to any other tenement; but neither of the other judges express any such doubt.

In the present case, it is clear that the testator used the cellar in question for his own purposes, and that it continued to be used with the house in which the plaintiff resided; he then gives to the plaintiff what the plaintiff occupied, and to the defendant what Edwards occupied, and those two occupations make up the whole property; there cannot be a clearer case, and the rule which has been obtained must be

Discharged.

(a) Park, J., was absent at chambers.

*463] *TINGLE v. ROSTON, Executrix of ROSTON.

A writ of *accedas ad curiam* issued to a court of conscience which proceeds equitably, may be set aside on motion.

THE plaintiff had proved upon his own oath, and recovered against the defendant in the Sheffield Court of Requests a debt of 5*l.* upon her failing to produce the testator's books, pursuant to an order of the commissioners, after an allegation by her that she had not sufficient assets to pay the debt.

The defendant sued out a writ of *accedas ad curiam*, upon the return to which, the foregoing facts appeared.

Peake, Serjt., who now showed cause against a rule nisi which had been obtained by *Wilde*, Serjt., to set aside this writ, endeavoured to distinguish the case of a writ of *accedas ad curiam* from that of a writ of false judgment (see ante *Scott v. Bye*, 2 Bingham 344,) and urged, that in the act constituting the Sheffield court, there was no clause giving the commissioners jurisdiction over executors.

But the Court observing, that it appeared on the return to the writ that the proceedings in the court below were of an equitable nature, refused to entertain the writ, and made the rule

Absolute.

*(IN THE EXCHEQUER CHAMBER.)

[*464

WHITEHEAD v. GREETHAM.

Count in assumpsit, that plaintiff had retained defendant, at his request, to lay out 700*l.* in the purchase of an annuity; that defendant promised to lay it out securely; that plaintiff delivered to him the money for that purpose, and that defendant laid it out insecurely:—*Held*, after verdict, that the consideration for the defendant's promise was sufficiently stated.

ERROR from K. B. on a verdict in an action of assumpsit against the defendant below, for failure in an undertaking to make a secure investment of certain money deposited in his hands by the plaintiff below for that purpose.

The ground of error was, that a general verdict had been given by the jury for the plaintiff below, upon the first five counts of the declaration, with general damages, though the third count was substantially defective in not alleging a sufficient consideration for the promise and undertaking set forth in that count, which was as follows:

Whereas before the making of the promise and undertaking of the said defendant hereinafter mentioned, to wit, on, &c., at, &c., the said plaintiff, at the special instance and request of the said defendant, retained and employed the said defendant to advance and lay out a certain sum of money, to wit, the sum of 700*l.* for the said plaintiff, in the purchase of an annuity, to be well and sufficiently secured, he the said defendant undertook, and then and there faithfully promised the said plaintiff, to use due and sufficient care to advance and lay out the said sum of money in the purchase of an annuity, the payment whereof should be well and sufficiently secured; and the said plaintiff in fact saith, that he, confiding in the said last-mentioned promise and undertaking of the said defendant, afterwards, to wit, on, &c., at, &c., delivered to him the said defendant the *said last-mentioned sum of money, for the purpose last aforesaid; and although the said defendant afterwards, to wit, on, &c., at, &c., did [*465 advance and lay out the said sum of money for the said plaintiff, in the purchase of a certain annuity, to wit, the purchase from the Reverend Samuel Locke, of an annuity or annual payment of 96*l.*, during the life of the said Samuel Locke, for and in consideration of the said sum of 700*l.*, the money of the said plaintiff, then and there advanced and paid by the said defendant to the said Samuel Locke; nevertheless the said defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtilly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would use due and sufficient care to advance and lay out the said sum of money in the purchase of an annuity, to be well and sufficiently secured, but wholly neglected so to do, and thereby craftily and subtilly deceived and defrauded the said plaintiff in this, to wit, that the said defendant then and there wrongfully and unjustly advanced and paid the said sum of 700*l.* to the said Samuel Locke as aforesaid, on a bad, insufficient, and inadequate security: and also in this, to wit, that the said Samuel Locke, before and at the time of the said advance of the said sum of 700*l.* to him as aforesaid, and from thence hitherto hath been, and still is, in bad and insolvent circumstances, and wholly unable to pay the said annuity or any part thereof: and, in truth and in fact, by reason of the badness and insufficiency of the said security, and of the said bad and insolvent circumstances of the said Samuel Locke, he, the said plaintiff, hath been and is wholly unable to recover or receive payment or satisfaction of the said annuity, and is likely to lose the same, as well as the said sum of 700*l.* so advanced and paid to the said Samuel Locke as aforesaid: and thereby also, he, the said plaintiff, hath lost and been deprived of the *use and benefit of divers [*466 sums of money, amounting in the whole to a large sum of money, to wit, the sum of 200*l.* paid by the said plaintiff, in and about the effecting and

keeping on foot a certain policy of insurance effected on the life of the said Samuel Locke, to wit, at Westminster aforesaid, in the county aforesaid.

Tindal for the plaintiff in error. An allegation that the defendant's promise was made on consideration, moving from the plaintiff is necessary to a count in assumpsit. Com. Dig. *Action on the case*, F. 5. But there is nothing in the present count to show that the defendant's promise was made in consideration of the plaintiff's retainer. It is true, a consideration may be implied, as in *Remington v. Taylor*, Lutw. 237. But in that case the contract of bargain and sale imported a promise to pay: here, the retainer is altogether distinct from the subsequent promise. [HULLOCK, B. After verdict it must be presumed every thing was proved that was necessary to sustain the action. It must have been proved that the defendant was entrusted by the plaintiff with 700*l.* to lay out, and that is a sufficient consideration.] If the defendant had been in a situation in which it might have been his duty to lay out money, that presumption might be raised; as in *Bourne v. Diggles*, 2 Chitt. Rep. 311, where he was an attorney of the court: but it does not appear here that he was in any such situation, or that he was entitled to reward. If there be any consideration it is insufficiently stated, and nowhere appears to be the ground of the defendant's promise.

Chitty, *contrà*. The omission of the words "*in consideration whereof*" is immaterial after verdict, and the consideration itself sufficiently appears in the retainer of *the defendant and delivery of money to him. The smallest *467] amount of consideration is sufficient, *Starlyn v. Albany*, Cro. Eliz. 67; *Pullen v. Stokes*, 2 H. Bl. 312; *Williamson v. Clements*, 1 Taunt. 523; in *Coggs v. Bernard*, 2 Ld. Raym. 919, Lord HOLT lays it down as sufficient if the plaintiff, upon request, does any thing for the defendant which he was not bound to do: and the same principle appears in *Elsee v. Gatward*, 5 T. R. 143; *Shiells v. Blackburne*, 1 H. Bl. 158, and *Hutton v. Osborn*, Selw. N. P. 382, 4th ed.; even the allegation of a promise has been holden unnecessary after verdict, *Starkie v. Cheeseman*, Carth. 309: it may be presumed that the consideration was proved at the trial, 1 Wms. Saund. 228, n. 2; and where the consideration alleged was a mere forbearance, without stating to whom the forbearance was extended, the allegation was deemed sufficient after verdict. *Jones v. Ashburnham*, 4 East, 455; *Marshall v. Birkenshaw*, 1 N. R. 172; *Hume v. Hinton*, Styles, 194. 304. To what extent defects in the statement of the consideration are aided after verdict appears also in *Richardson v. Mellish*, 2 Bingh. 229.

Tindal in reply. In the first class of cases cited there was some consideration stated, though a small one; so that they do not apply to a case in which there is none. The second class from *Coggs v. Bernard* downwards, were actions on the case in which the defendant was liable in virtue of his duty. With respect to the cases in assumpsit, in which the verdict has been holden to cure a defective allegation of consideration, it may be answered, that a verdict will not supply the entire omission of a material allegation, and in the count in question, *468] it *was material to aver that the promise was made in consideration of the retainer.

BEST, C. J. The court is of opinion, that this count is sufficient after verdict. The objections which have been made to it, are, first, that there was no consideration for the defendant's promise; secondly, that if there was, it is insufficiently stated.

The second objection cannot be raised in this stage of the cause; if available at all, it is an objection on demurrer, but not in error or arrest of judgment.

Is there then, any consideration for the defendant's promise? the count states, that the plaintiff had retained the defendant at his request to lay out 700*l.* in the purchase of an annuity. That the defendant promised to lay it out securely, and that the plaintiff delivered him the money for that purpose. The case of

Cogg's v. Bernard decides that this was abundant consideration ; the consideration in that case was the delivery of brandy ; here it is the delivery of 700*l.*, which casts it on the defendant to account for the same. It is urged, indeed, that though this consideration appears, it is no where stated to be the consideration for the defendant's promise ; but after verdict it must be taken that the promise was made upon this consideration. The principle is, to ascertain what the judge would require to be proved at *Nisi Prius*, and in the present case nothing less would have been sufficient than proof of the delivery of the money to the defendant, and of his engagement to lay it out. The judgment of the court above, therefore, must be

Affirmed.

*(IN THE EXCHEQUER CHAMBER.)

[*469]

RUSTON v. OWSTON.

It is no error to entitle the declaration of Michaelmas term generally though the cause of action is stated in it to have accrued on the 18th of November.

ERROR from the Court of K. B. upon a judgment by default. The cause of error was, that the declaration was entitled *generally* of Michaelmas term, 4 Geo. 4, and therefore related to the first day thereof, November 6th, while all the causes of action were stated to have accrued on the 18th of November ; the allegation being, that on that day the defendant below was indebted to the plaintiff below, for goods before that time sold and delivered to him by the plaintiff below ; and that being so indebted, he on the same day and year aforesaid promised to pay ; so that on the face of the proceedings the declaration appeared to have been delivered before the cause of action accrued.

D. F. Jones for the plaintiff in error. The objection which has been made, is fatal on error, although it may be otherwise on demurrer, or after verdict. *Bishop v. Kaye*, 3 B. & A. 605. In *Pugh v. Robinson*, 1 T. R. 116, where the objection was overruled on demurrer ; and in *Dickenson v. Plaisted*, 7 T. R. 475, the court allowed the parties to amend, which would not have been necessary unless for the purpose of avoiding the objection on error. In *Venables v. Daffe*, Carth. 113, (an action on the case for a malicious prosecution,) it was holden, that the bill and declaration were bad, because it appeared the plaintiff had no cause of action on the first day of Michaelmas term, to *which the declaration related, and in 2 Wms. Saund. 1, n. 2, the same [*470] principle is laid down.

BEST, C. J. I should be sorry if the court were compelled to yield to an objection so contrary to justice and common sense. This declaration is entitled of Michaelmas term, which commences on the 6th of November. But we may collect, that it was delivered after the 6th, for the causes of action are stated to have accrued on the 18th, and we can take judicial notice that that is a day within the term. The whole term is considered as one day, and it is sufficient if there is any thing on the record to show the delivery to have been within the term.(a)

Judgment affirmed.

(a) *Ward v. Gansell*, 3 Wils. 154, 2 Bl. 735.

PRYCE and Another v. WILKINSON.

Plaintiffs being ordered to sell an estate, or to raise money upon it, and being unable to effect a sale, applied to A., by negotiation with whom, money was obtained, but without any further interference on the part of plaintiffs : Held, that they could not recover more than 2*½* per cent. commission for procuring this money.

THE declaration of the plaintiffs stated, that defendant was indebted to plaintiffs in 1000*l.*, for the work and labour, care, diligence, journeys, and attendance of plaintiffs, by them done, performed, and bestowed, as the agents of and for defendant, and on his retainer, and for certain commission and reward due and of right payable from defendant to plaintiffs in respect thereof. And being so indebted, defendant in consideration thereof undertook and promised to pay plaintiffs, &c.

*471] "The declaration also contained a quantum meruit upon the foregoing count, the usual counts for money lent, paid, had and received, and a count on an account stated.

The defendant suffered judgment by default, and a writ of inquiry of damages was executed before the secondary, when it appeared that the plaintiffs brought the action to recover 105*l.*, being a commission of 2½ per cent. for procuring for the defendant the loan of 4200*l.* on mortgage of his advowson of Bulvan, in Essex, of which he was the incumbent.

The defendant wishing to dispose of that property subject to his own incumbrance, employed the plaintiffs to sell it. The plaintiffs having failed in their attempts to sell, applied to an attorney, by negotiation with whom a loan of 4200*l.* was ultimately effected, but without any further interference on the part of the plaintiffs.

In support of their claim to the commission, the plaintiffs produced before the secondary several letters from the defendant to them, in one of which the defendant stated, that he certainly would not object to the plaintiffs' terms of 2½ per cent., if they would finish the business speedily.

On behalf of the defendant it was objected, that the demand of 2½ per cent., was illegal under the statutes of usury, 12 Car. 2, c. 13, s. 3, and 12 Anne, stat. 2, c. 16, s. 2, which limit the commission upon the procuration of loans to 5*s.* per cent. The secondary was of opinion, that the plaintiffs were barred by the statutes from recovering more than 5*s.* per cent.; and he, therefore, in his charge to the jury, told them, that if they considered the work and labour proved by the plaintiffs entitled them to 10*l.* 10*s.*, (which was the utmost they could recover, being 5*s.* per cent. on 4200*l.*.) they must give a verdict for that sum; and if not, then for any less sum that they thought proper. The jury *472] returned a verdict for 10*l.* 10*s.*, and the plaintiffs, upon affidavit stating the foregoing facts, obtained a rule nisi for setting aside the inquisition, upon the ground of misdirection on the part of the secondary.

Bosanquet, Serjt., in showing cause, relied on 12 Ann. stat. 2, c. 16, s. 2, by which it is enacted, "that all and every scrivener and scriveners, broker and brokers, solicitor and solicitors, driver and drivers of bargains for contracts, who shall after the 29th day of September, 1714, take or receive directly or indirectly, any sum or sums of money, or other reward or thing for brokerage, soliciting, driving, or procuring the loan or forbearance of any sum or sums of money over and above the rate or value of 5*s.* for the loan or forbearing of 100*l.* for a year; and so rateably; or above 12*d.* over and above the stamp duties for making or renewing of the bond or bill for such loan, or forbearing thereof, or for any counter bond or bill concerning the same, shall forfeit for every such offence 20*l.* with costs of suit, and suffer imprisonment for half a year; the one moiety of all such forfeitures to be to the queen's most excellent majesty, her heirs and successors, and the other to him or them who will sue for the same," &c.

Wilde, Serjt., insisted, that the plaintiffs did not procure the money; that they were neither scriveners nor brokers, solicitors nor drivers of bargains, but that they, at the request of the defendant, looked out for, and found a person who had the money to lend, and referred the defendant's solicitors to him: he also contended, that if the plaintiffs were procurers of the money, the commis-

sion was not agreed to be paid to them simply for procuring the money, but for their trouble in endeavouring to effect the sale or mortgage of the "advowson; and that they became entitled to it on the completion of either of the two contingencies. [*473

BEST, C. J. The plaintiffs were applied to by the defendant to procure the sale of an estate, or an advance of money upon it. The sale was not accomplished, but the plaintiffs endeavoured to procure a loan; they say they went to an attorney for that purpose, and for that they make their charge: it is clear, therefore, that they did assist in procuring the loan. For this service can they charge $2\frac{1}{2}$ per cent., or are they confined to 5s.? I need not say, whether or not they have been guilty of a punishable offence, but the transaction in which they have engaged is clearly within the policy of the act, and it would be contrary to its provisions to allow more than 5s. per cent. for the plaintiffs' services. The object of the act was, to protect persons in distress against the extortionate exactions to which they might otherwise be exposed in the attempt to procure money for their exigencies. After providing that no more than a certain rate of interest shall be taken upon loans, it goes on, sect. 2, "all and every scrivener and scriveners, broker and brokers, solicitor and solicitors, driver and drivers of bargains," (the plaintiffs are drivers of bargains; they do not, indeed, drive the nail to the head, but they find out a person who undertakes the work, and they allow it to be driven; they assist in driving; and if they assist, they are drivers;) "who shall take for soliciting, driving, or procuring the loan or forbearance of any sum of money over and above the rate or value of 5s. for the loan, or forbearing of 100*l.* for a year, shall forfeit for every such offence, 20*l.* with costs of suit, and suffer imprisonment for half a year." Have they not solicited? Have they not procured the money? If they had obtained the whole, they could only have charged 5s. per cent., and it would be absurd to allow them to charge more for obtaining less than the whole. It [*474 is of importance that improvident persons should be protected, and not be allowed to surrender to those harpies who prey on the unwary, the money which belongs to their bona fide creditors. It should be fully understood, that persons engaged in these transactions, are not only liable to lose their charges, but to pay a fine of 20*l.*, and suffer imprisonment for half a year.

PARK, J. If the plaintiffs' argument could prevail, the procurers of money at exorbitant rates would always stop short before the completion of the transaction, and so elude the provision of the statute.

BURROUGH, J. Had the plaintiffs expressly contracted for $2\frac{1}{2}$ per cent., they could not have received it, because the whole transaction is illegal. If they took $2\frac{1}{2}$ they were guilty of a misdemeanor, and many cases decide that he who contributes to a misdemeanor, is equally guilty as the principal actor.

GASELEE, J., concurring, the rule was

Discharged.

*STORTON v. TOMLINS.

[*475

Though the court, on the ground of minority and the want of a proper memorial will set aside a judgment entered up on a warrant of attorney to secure an annuity; they will not on those grounds alone order the deeds to be delivered up to be cancelled.

Onslow, Serjt., on the ground of the minority of the grantor, and the want of a proper memorial, had obtained a rule nisi for setting aside the judgment entered up in this case, to recover the arrears of an annuity; and also for delivering up to be cancelled the deeds securing the annuity.

Wilde, Serjt., who opposed the rule as to cancelling the deeds, cited *Dalmei v. Barnard*, 7 T. R. 248; *Ex parte Chester*, 4 T. R. 694; *Symonds v. Cobourne*, 1 B. & P. 482; to show that the courts had never extended the ex-

cise of their discretionary jurisdiction in these cases, to the cancelling of deeds, but had confined it to setting aside the judgment on a warrant of attorney, over which they possess a peculiar control.

Onslow relied on *Williams and others v. Hockin*, 8 Taunt. 435, in which it seemed the deeds had also been vacated; and on 3 Bl. Com. 462, where it is said the court may order the securities to be cancelled.

He urged also that the 17 G. 3, c. 26, s. 6, renders the contract of a minor in these cases utterly void; and that if the contract were void, the deed relating to it must be void also.

BEST, C. J. That part of the rule which calls on the court to set aside the judgment must be absolute, but under the statute, we have no authority in this case to order the deeds to be delivered up, to be cancelled. The fourth section *476] has specified certain cases in which the authority of the court is carried to that extent, but the present is not one of the cases enumerated, and from the specification of those particular cases, it must be inferred that it was not intended the authority of the court should extend to cases not enumerated.

PARK, J., and BURROUGH, J., concurred.

GASELEE, J., referred to *Steadman v. Purchase*, 6 T. R. 737; *Appleby v. Smith*, 3 Anstr. 865, and *Jefferies and Wife v. Duchess of Athol*, *ibid.*, and said, that under circumstances like the present, the deeds had never been delivered up to be cancelled, where the attention of the court had been called to the subject.

The rule, therefore, was made absolute, only for

Setting aside the judgment.

HALL v. ALDERSON and Another.

The court cannot interfere to alter the terms of an award in order to make them consist with the submission, even where the submission to arbitration gives minute directions for the course to be pursued by the arbitrator.

THE defendants had employed the plaintiff in the conduct of certain mines, and had agreed to allow him one-tenth part of, or 10l. per cent. upon the profits or clear income of the mines, by four quarterly payments on each year: provided, that upon the defendants or the survivor of them giving the plaintiff twelve months' notice, his engagement should cease at the end of such twelve months. And it was agreed, that if the engagement should be ended by the notice of the defendants, a sum equal to a year and a half of a regular year's salary or per centage, should be allowed the plaintiff over and above the salary *477] before reserved, to be calculated at the same rate of profits by the year, as the amount on which the plaintiff had received, or was entitled to receive his per centage upon the last year of his management; and if the net profits of the mines during the last year of the plaintiff's management amounted to 5000l., the plaintiff was to receive a per centage of 15l. per cent. upon the succeeding years' profits of the mines.

The plaintiff having sued the defendants for an alleged breach of this agreement, the matters in dispute were referred to arbitration. By the submission, the arbitrator was required, among other things, to state in his award the whole amount of the produce and outgoings of the mines, and whether, on calculating the profit or loss of the mines, he had excluded any and what part of the outgoings, and upon what year he estimated the allowance, if any, to the plaintiff in respect of the profits of the last year of his management.

The arbitrator by his award found, among other things, that the plaintiff managed the mines from May, 1814, to March, 1818, when he was dismissed by the defendants, who gave at the same time a twelvemonth's notice of their determination to end the engagement, in case it should be holden that they had not a sufficient ground for breaking it off without such notice:

That there was not sufficient ground for dismissal without notice; that the plaintiff, therefore, virtually retained his office for one year after his dismissal:

That he was entitled to a tenth part of the profits for the time of his actual service, and one year following his dismissal, and to 15 per cent. additional on the profits of that year:

That in such calculation the plaintiff was not entitled to include the waste hillocks as ores in hand, they being the refuse of former workings accumulated in the course of many years:

*That the additional 15 per cent. was to be calculated on the actual, and not the possible profits of the year; that, therefore, evidence as to the possible profits had been rejected, and that the produce of a certain quantity of ore on hand and not smelted at the time of the dismissal (valued when smelted, at 3675*l.*.) was to be taken into the profits of the year following, that is, that the plaintiff was to have 25*l.* per cent. thereon. [478]

The charges for raising this 3675*l.* worth of ore, the arbitrator had included in the outgoings of the year preceding the plaintiff's dismissal.

The *Attorney-General* now moved for a rule calling on the plaintiff to show cause why the court should not alter this award, by placing the 3675*l.* profits on this ore to the account of the year preceding the plaintiff's dismissal, the year in which it appeared, by a schedule appended to the award, that the arbitrator had charged the defendants with the expenses of the outgoings on the same ore. The object of this alteration was to deprive the plaintiff of the additional per centage to which he was entitled if the profits amounted to 5000*l.* during the *last* year of his management; and it was contended that the court was authorized to make this alteration under the precise and detailed directions for the arbitrator contained in the order of submission, and the distinct findings set out in the award, by means of which the whole subject in dispute was laid open to the revision of the court. The faculty of procuring such a revision must have been proposed by the parties, or the order of submission would have been less particular as to the mode of proceeding prescribed to the arbitrator.

Vaughan, Serjt., on the part of the plaintiff, opposed the proposed alteration, but moved to set aside the award on the grounds adduced for the proposed alteration,—on the rejection of evidence as to possible profits,—and on several objections, which, as they did not appear on the face of the award, the court refused to entertain. [479]

No authority having been cited by the attorney-general, the Court thought they had not power to interfere with the structure of the award, and being perfectly satisfied with what the arbitrator had done, they

Refused both the rules.

DOKER, Executrix of JOHN GOFF, v. HASLER.

The plaintiff's attorney, upon issuing execution, wrote to the sheriff's officer, directing him to leave the defendant's mother or any one else in possession of the defendant's goods, and to allow his business to be carried on as usual. The officer delivered the warrant to defendant's shopman, ordering him to carry on the business, and account for moneys received. No money was ever paid to the plaintiff, and the warrant lay in the shopman's hands from April to June; the defendant having then become bankrupt and his assignees claiming his goods, the sheriff returned nulla bona to the plaintiff's writ. The jury having found a verdict for the sheriff in an action against him for a false return, the court refused to grant a new trial.

CASE against the sheriff of Surrey for a false return of nulla bona to a fieri facias issued by John Goff, the testator, against William Goff, his son, a linen draper at Brighton. The declaration contained the usual allegation, that the writ endorsed with a direction for the sheriff to levy *l.* besides poundage, was delivered to the sheriff to be executed in due form of law. At the trial

before **BEST**, C. J., London sittings after Michaelmas term last, the facts appeared to be as follows :

The execution was issued on the 14th of April, 1821, under a warrant of attorney to confess judgment for 1553*l.*, and John Goff's attorney addressed a *480] letter to the sheriff's officer, in which he said, " You may with safety, and have my consent to, put Mrs. Goff, the defendant's mother, or any one else you please in possession, and permit and suffer the trade and business to be carried on as usual under the defendant's direction." The officer, after having made the levy, left the warrant in the house in the charge of one of the shopmen (William Goff being absent,) charging the shopman to carry on the business as usual, and to account to him, the officer, for the moneys received. In this manner the business was carried on up to the 28th of June, 1821. And no part of the money received was paid over either to John Goff or his attorney. A commission of bankruptcy was issued against William Goff on the 14th of June, 1821, and the assignees considering the execution fraudulent, indemnified the sheriff, who thereupon made the return for which this action was brought.

BEST, C. J., told the jury, that if they thought the execution was issued, not for the purpose of selling, but of protecting William Goff's goods, they ought to find a verdict for the defendant. A verdict having been found accordingly,

Vaughan, Serjt., moved for a new trial, on the ground that the direction given to the jury could only have been proper in case the action had been trover against the assignees, but that in an action against the sheriff for a false return, he could not defend himself on the score of a misapplication of the process of execution, to which misapplication he had himself been a party. A rule nisi having been granted,

Pell and **Wilde**, Serjts., now showed cause. The sheriff represents the assignees who indemnify him for this return, and stands in the same situation as *481] they. Now, as between conflicting creditors, an execution not *carried into effect with convenient speed has always been deemed fraudulent. An execution to delay bonâ fide creditors is fraudulent under 13 Eliz. c. 5, and even at common law, the defendant's remaining in possession of goods, against which execution has issued, is considered a strong badge of fraud. *Twynes'* case, 3 Rep. 80. The assignees were also entitled to claim these goods under the statute of James, as being goods of which the bankrupt was in possession as reputed owner.

The circumstance that the party issuing the execution is himself a creditor, does not alter the case if it be clear that the execution was only issued to protect the debtor, a circumstance which the jury has expressly found in the present instance. *Vin. Abr. Fraud*, G. 3; *Bradley v. Wyndham*, 1 Wils. 44; *Smallcomb v. Sheriff of London*, 1 Ld. Raym. 251; *Jackson v. Irving*, 2 Camp. N. P. 48; *Toussaint v. Hartop*, Holt, N. P. 335; *Payne v. Drewe*, 4 East, 523; *Blades v. Arundale*, 1 M. & S. 711. The plaintiff can only recover on the strength of his own case, and he has failed in showing as he alleges in the declaration, that he delivered this writ to be executed.

Vaughan. Under 13 Eliz. the execution is valid, unless the judgment be fraudulent as well as the execution, and in none of the cases cited had the party suing out the first execution taken and retained possession as in the present instance.

BEST, C. J. The view I took of this case at the trial was correct, though I afterwards entertained some doubt as to the propriety of my direction to the jury. The plaintiff must recover on the strength of his own case, and, in his *482] declaration against the sheriff, he alleges that *the writ against Goff was delivered to the sheriff to be executed in due form of law. I put it to the jury to determine, whether or not the plaintiff had made out all the allegations in his declaration; and I told them, that if they were of opinion that the

writ was issued, not for the purpose of selling the goods but of protecting them, the plaintiff had failed to make out his allegations. The jury have found a satisfactory verdict as to that fact; indeed they could find no otherwise after the letter from the plaintiff's attorney had been read, and it appeared that the warrant to levy was delivered to one of the shopmen, who continued to carry on the business. It is impossible to distinguish this case from many of those which have been cited. The writ, having never been executed, was a nullity as against the claim of the assignees, and it was unnecessary for them to recur to the statute of James, which does not apply to the case. The plaintiff might, if he pleased, have divested the bankrupt of all title to the goods before the claim of the assignees accrued, but he omitted to do so, and the sheriff would have been liable to the assignees if he had made a different return.

PARK, J. I do not decide on the ground of the indemnity which has been given to the sheriff, or on the statutes of James or Elizabeth; but the plaintiff must make out his own case, and he shall not be permitted to sue the sheriff for an omission authorized by himself. It is not true, as he alleges in his declaration, that the writ was delivered to be executed; and in *Blades v. Arncliffe*, where the writ was put into a drawer, it was holden that no execution had taken place.

BURROUGH, J. A sheriff is to blame who places himself in this situation; he ought to have come to the court in the first instance. But the plaintiff must make out his whole case, and it is not true, as he alleges, that the writ was delivered to the sheriff to be executed; the only object was to protect the property, and the verdict which has been found for the defendant must stand. [*483]

GASELEE, J. The cases cited relieve us from any difficulty as to this return; the principle contained in them being, that if a first writ is not delivered for the purpose of execution, and the goods are taken under a second, the sheriff may return nulla bona to the first. In the present case, the first writ was issued obviously for the purpose of protecting the property, and the assignees stand in the same situation as a new creditor with a second execution. The plaintiff has failed in proving his most material allegation, and the justice of the case is with the verdict; the rule, therefore, for a new trial, must be

Discharged.

WICKES v. CLUTTERBUCK.

If a warrant of commitment does not show an offence over which the magistrate who issued it has jurisdiction, an action lies against him for the commitment, although there might have been a previous regular conviction.

A direction to the jury, partially incorrect, is not a ground for a new trial, where the verdict is consistent with the justice of the case.

THE plaintiff declared against the defendant in trespass, for having assaulted and caused him to be assaulted, apprehended, unlawfully imprisoned and detained in prison for a long time, without any reasonable or probable cause. Plea, not guilty.

At the Hertford Summer assizes, 1824, it appeared that the plaintiff had been apprehended under a warrant issued by the defendant as a magistrate of the county of Herts, and had been convicted under the 5 G. 3, c. 14, s. 3, (a) on the oaths of the Honourable and Reverend William Capel and another, of attempting "to take, kill, and destroy the fish in a certain pond or pool of water, called the Reservoir, in the parish of Aldenham, in the liberty of St. Alban's, by fishing in the said pool or pond with a fishing rod and fishing line, with intent to take, kill, or destroy the fish preserved therein, without

(a) By which it is enacted, "That any person who shall kill or destroy the fish in any river or stream, pond or pool, or other water, being lawfully convicted, shall forfeit and pay, for every such offence, the sum of 5*l.* to the owner of the fishery."

the consent of the said Hon. and Rev. Wm. Capel, contrary to the form of the statute in such case made and provided; he, the said Wm. Capel, being then and there owner of the fishery within the said pond or pool of water, and the said J. Wickes not then and there having any just right, or any reasonable or probable claim or cause to take, kill, carry away, or to destroy, or to attempt to take, kill, or destroy any fish in the said pond or pool of water, the said pond or pool not then being in a park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling-house, but then being in other enclosed ground, then and there being private property in the parish of Aldenham aforesaid:” whereupon he had been fined in the sum of 5*l.*, and refusing to pay the fine, was committed to prison by the defendant for seven days. The reservoir, in which the plaintiff had fished, belonged to the Grand Junction Canal Company. It consisted of about 60 acres, which had formed part of Aldenham common, and was surrounded by a fence, except where a turnpike road was carried across it on a kind of causeway. On each side of the turnpike road *485] were rails, and over these rails the plaintiff had projected his rod *and line. The fishery belonged to the lord of the manor, who had let it to the said Wm. Capel.

The plaintiff, who had asserted a kind of right to fish from the road, seemed in some measure to exult at the sentence of the magistrate, and refused all accommodation during his imprisonment.

The warrant of commitment put in by the defendant was as follows:

“Liberty of St. Alban’s in the county of Hertford.—To Henry Simmonds, constable of Watford, and also to the keeper of the house of correction at St. Alban’s in the said liberty.

“Forasmuch as Joseph Wickes, of the parish of Bushey in the said county, corn-dealer, is convicted before me, Robert Clutterbuck, Esq., one of his majesty’s justices of the peace for the said liberty and county, on the complaint of the honourable and reverend William Capel, and on the oath of Thomas Harrison, servant to the Grand Junction Canal Company, for fishing with a rod and line in a pond or pool of water commonly known by the name of the reservoir in the parish of Aldenham in the said liberty, on the 16th day of May instant; the right of fishing in the said pond or pool being the private property of the honourable and reverend William Capel:

“And whereas the said Joseph Wickes is duly convicted by me, the said justice, in the penalty of five pounds, and the said Joseph Wickes refusing to pay the same, these are, therefore, to require you, the said Henry Simmonds, to convey the said Joseph Wickes to the house of correction at St. Alban’s, and deliver him to the keeper thereof; and you, the said keeper of the said house of correction, are hereby required to receive the said Joseph Wickes into your custody in the said house of correction, and him safely keep for the space of *486] seven *days, unless the said penalty of five pounds shall be sooner paid. Given under my hand and seal the 18th May, 1822.

ROBERT CLUTTERBUCK, (L. S.)”

The case of *Brittain v. Kinnaird*, 1 B. & B. 432, was relied on by the defendant, as an authority to show that the conviction was conclusive evidence in his favour, and that it was not competent to the plaintiff to controvert the facts it alleged.

But the learned judge, who tried the cause, stated to the jury that the plaintiff might show the reservoir not to be within enclosed ground; that the conviction did not bring the case within the act of parliament; that the case itself was not within the jurisdiction of the magistrate; and that the plaintiff was entitled to a verdict. A verdict was accordingly found for him, with 35*l.* damages.

Taddy, Serjt., obtained a rule nisi to set aside this verdict and have a new trial, on the ground of an alleged misdirection by the learned judge who tried the cause.

Vaughan and *Lawes*, Serjts., who showed cause against the rule, offered to consent to a new trial upon the merits only; which being rejected, they proceeded to argue that the warrant of apprehension and conviction were both bad, and as such could not constitute any justification to the magistrate; but the court ultimately stopped the argument on these points, and confined their judgment to the warrant of commitment. This, it was contended, could not operate in defence of the magistrate, since it failed to state any offence over which the magistrate had jurisdiction, and did not even pursue the terms of the conviction, so that *it could not be collected from the warrant whether the plaintiff was committed for the offence alleged in the conviction or for any other. [*487 The warrant was good for nothing; and if death had been occasioned in resisting the execution of it, the offence so committed would not have amounted to murder, as in the case of a regular warrant. If this action did not lie against the magistrate for an improper commitment, the plaintiff had no remedy, for by 24 G. 2, c. 44, s. 6, the warrant, however informal, was a justification to the constable; and that statute had expressly enacted, that where any wrong was done, the action should be brought against the magistrate himself.

By stat. 7 Jac. c. 5, the privilege was conferred on the magistrate of giving in evidence, under the general issue, the conviction, and matters done under it. Nevertheless the power of giving such matters in evidence would not render them an answer to the action, unless they would have been an answer if pleaded before the statute. But before the statute, the magistrate's warrant, if illegal on the face of it, would not have been an answer to the action; for, if it would, all actions against magistrates for misdoing would be in vain. The case of *Brittain v. Kinnaird* was distinguishable from the present, for that was a proceeding in rem; there was no commitment; and the conviction was good on the face of it. But *Rogers v. Jones*, 1 Moody & Ryan, 129, (in which it was holden that a magistrate could not justify a commitment under a warrant which did not pursue the conviction,) was in point for the plaintiff, and Lord Mansfield said, in *Rex v. Corden*, 4 Burr. 2281, "that a tight hand ought to be holden over these summary convictions." *Morgan v. Hughes*, 2 T. R. 225, and *Hill v. Bateman*, 1 Str. 710, show that trespass is the proper form of action in which to sue the magistrate where he *has acted without jurisdiction, and *Rex v. Daman*, 2 B. & A. 378, decides that he has no [*488 jurisdiction in a case like the present, unless it appear on the face of the proceedings that the information was at the instance of the owner of the fishery, and judgment prayed on his behalf.

Taddy and *Cross*, Serjts., in support of the rule, were desired by the court to pass by the warrant of apprehension and conviction, and to support the warrant of commitment.

They thereupon argued, that assuming the conviction to have been good, a magistrate ought not to be punished for a mere clerical error in the warrant of commitment. That such a liability would deter magistrates from acting in the commission of the peace.

That though an inferior officer must rely on the warrant under which he acts, the magistrate is justified by the conviction alone, and the warrant is not in issue; which is the reason why the 24 G. 2, c. 44, requires the magistrate to be joined in actions against the constable; and if the warrant were never so perfect it would not constitute a justification for the magistrate, unless he could support his conviction.

According to Hawkins, c. 13, s. 25, it is in the discretion of the magistrate whether he shall insert in the warrant the special charge of commitment or not, and the only reason for the insertion seems to be to insure the punishment of the officer in case of escape. If the magistrate had justified in a special plea previous to the passing of the act of 7 Jac. c. 5, and 24 G. 2, he need not have set out the warrant; it would have been sufficient to rely on the conviction, and the

case is not altered by his being allowed to plead the general issue. *Rogers v. Jones* is distinguishable from the present case, inasmuch as the conviction and *489] commitment proceeded *on two different acts of parliament, whereas it is sufficiently clear in the present case, that the warrant of commitment relates to the conviction; and it has never been holden necessary, in a process of execution, to set out the whole judgment to which it relates; or if necessary, the judgment is virtually set out by the reference to it in the warrant. From *Boucher's case*, Cro. Jac. 81, it may be collected that the only effect of an informality in the warrant is to throw on the magistrate the burthen of supplying the defect by evidence, and in *Brace's case*, Comb. 390, Lord Holt said there was no pretence for bringing an action against a judicial officer for such a slip as this. In *Hill v. Balemán* the magistrate had altogether usurped the jurisdiction he exercised. In *Morgan v. Hughes* no complaint had been made before the magistrate, and in *Massey v. Johnson*, 12 East, 67, it did not appear on the conviction that any information had been laid. But *Brittain v. Kinnaid* is in point for the defendant, and in *Gray v. Cookson*, 16 East, 21, Lord ELLENBOROUGH says, "as to the objection upon the stat. 43 G. 3, c. 141, magistrates were before protected in an action of trespass by a subsisting conviction good upon the face of it, and the act meant to protect them still further, to a certain extent, in a case where before they were left unprotected by the quashing of the conviction. Even before this statute, I had always considered that if a conviction were produced at the trial, which would justify the imprisonment, that was sufficient." At all events, the plaintiff ought to have shown that he sustained some damage by the clerical error in the conviction, and the judge ought to have directed the jury that the cause of action arose, not on an improper assumption of jurisdiction, but on a mere omission in the warrant.

*BEST, C. J. We have been told by the counsel for the defendant, *490] that gentlemen will not act under the commission of the peace, if they are held liable to actions for defects in their warrants. I have too high an opinion of the wisdom and public spirit of that most valuable body of men, the magistracy of England, to apprehend any such consequence.

Important as the duties of a magistrate are, a man of ordinary sound understanding and singleness of heart will have no difficulty in discharging them satisfactorily to himself and the country, and will find that he has all the protection from the law that he can desire. He is not to be called on to answer criminally, unless it can be clearly proved that he was actuated by corrupt motives. Considering the thousands that there are in this kingdom devoting their gratuitous services to the country as magistrates, it is most honourable to the magistracy, and most fortunate for the community, that an instance seldom occurs of one of them being found to have acted intentionally wrong.

If, by the mistake of a magistrate, any man is injured, he cannot maintain any action for his injury, against the magistrate, without giving him notice of his intention to bring the action one month before it is brought; during that time the magistrate may ascertain the extent of the injury, and protect himself against the action by the tender of sufficient amends. No honourable man will consider that he degrades himself, or the body to which he belongs, by such a tender. When a man has injured another, even through inadvertence, he will be disposed, not only for the sake of justice, but that he may keep his place in the estimation of the public, promptly to offer redress.

We cannot bind the law to favour any description of persons, however meritorious. Summa ratio et sapientia boni civis est omnes æquitate eâdem continere.

*I am of opinion that the warrant of commitment, in this case, is *491] bad. It is not necessary, therefore, to consider the warrant of apprehension, the conviction, or any other proceeding previous to the warrant of commitment. It contains in it nothing which gives the magistrate

any jurisdiction, much less any cause for fine or commitment. The warrant states that the plaintiff was duly convicted before the defendant for fishing with a rod and line in a pond or pool of water, commonly known by the name of the Reservoir, the right of fishing in the said pond or pool being in the honourable and reverend William Capel. This pond or pool may, for any thing that appears, be on an open common, or in some unenclosed land by the side of a road, and accessible to all the world. Such a pond or pool would not be within the protection of the statute 5 G. 3, c. 14. To bring the case within that statute, the pond or pool must be *in some enclosed ground which shall be private property*. The object of the legislature was to prevent trespassers from intruding into parks, gardens, and enclosed places, and also to preserve fish in those waters in which the owner would be most desirous of preserving them. Although, therefore, a trout in a river running through a common is of equal value with a trout in a river running through a park or garden, the taking of trout from the stream on a common is only a trespass, whilst the taking one from a stream in a park or garden is a transportable offence; and the taking one from a stream in enclosed grounds subjects the person taking it to a penalty of 5*l.*, and to six months' imprisonment, if he is unable to pay this penalty. It is of the essence of this offence that the fishing should be in *enclosed grounds and private property*, and yet nothing of this appears on the warrant.

But it has been said that the law does not require the offence to be stated in the commitment. It is not perhaps necessary that the offence should be stated with *the same precision in the warrant of commitment as in the conviction, but enough should be stated to show an authority to imprison; [*492 without such a statement the officer cannot arrest. A man is not to be deprived of his liberty by a warrant which only shows that he has committed a trespass by fishing where he had no right to fish. Hawkins, in his Pleas of the Crown, a book of great authority (b. ii. c. 16, s. 15.) says that the offence ought to be set forth with convenient certainty, otherwise the officer is not punishable for suffering the party to escape; and the court before whom he is brought by habeas corpus ought to discharge or bail him. A man cannot be legally imprisoned whom it is the duty of the court to discharge, and who may escape with impunity: such imperfect warrants provoke resistance to the officers who are charged to execute them.

Another point has been made; namely, that the officer executing the warrant, who is not to blame, is liable to an action; but not the magistrate, who is. In trespass all are principals; and if an order be unlawful, he who gives it is as much responsible as he who executes it. (2 Roll. Abr. 55, l. 10.)

Farther, it has been insisted that the conviction will protect the magistrate. It has more than once been decided that in an action against a magistrate, a plaintiff is not permitted to controvert the facts stated in a conviction drawn up by such magistrate. I am not prepared to go farther, and say that if the conviction state an offence which would justify a magistrate in issuing a warrant of commitment, that conviction would protect him if he cause a person to be arrested and imprisoned on a warrant which states no ground for such arrest and imprisonment. In the case of *Gray v. Cookson*, 16 East, 13, to which we have been referred, the warrant stated an offence which authorized the commitment, but did not state that *such offence was regularly proved in the presence of the party committed. That case is therefore unlike the present. [*493 Admitting that the judge was wrong in allowing evidence to be given in contradiction of the conviction, still if the warrant of commitment is illegal, the plaintiff is entitled to the verdict, and we do not grant a new trial for misdirection, if the verdict be right.

It is insisted that the damages would not have been so large if the jury had been told only to give damages on account of the irregularity of the warrant of commitment.

I think the defendant has no right to complain of the damages, when he refuses to go down to trial on the merits of the case. The plaintiff offers to consent to a new trial if the defendant will allow him to prove what the case really was, and not shut him out of that proof by his conviction.

This offer the defendant has refused; I therefore think his rule should be discharged.

PARK, J. A very strict construction ought to be put upon all statutes so penal as that which has been the occasion of the present action, and the objection raised on the part of the plaintiff does not relate to a mere literal blunder, but to an error in substance. The case of *Rogers v. Jones*, which is in point for the plaintiff, is very distinguishable from that of *Brittain v. Kinnaird*, of which at the time of trying *Rogers v. Jones* I was fully aware, having myself formed one of the court at the time *Brittain v. Kinnaird* was decided. In *Brittain v. Kinnaird* there was no warrant of commitment; the subject-matter of the conviction was a boat, and the conviction was holden conclusive as to that fact; but here the magistrate is to get rid of a bad commitment by referring to a previous conviction. In this perhaps he might have succeeded if he had *494] shown that the commitment pursued the *conviction, and that the conviction was good, which for the present purpose I will assume to have been the case. But the commitment is on a ground totally different from that charged in the conviction, and how am I to know there were not two informations against the party? Besides, the commitment does not state any ingredient of the offence described in the act, nor any offence within the summary jurisdiction of the magistrate; and it is not enough for us merely to believe that it refers to the conviction in a matter which ought to be considered so strictly. In the case of *Rogers v. Jones*, which had upon motion for a new trial the sanction of the Court of King's Bench, the plaintiff had been convicted under the 6 G. 3, c. 48, while the commitment was for an offence against the 15 Car. 2, c. 2; and it was held that the magistrate was bound by the erroneous commitment, notwithstanding the regular conviction. It is clear therefore that in the present case, the commitment being defective, the magistrate cannot rely on it, although the conviction might have been regular.

BURROUGH, J. I agree with the learned counsel for the defendant, but on grounds different from those suggested by him, that this is a case of great importance to magistrates. It is important to point out to them, that in the exercise of a summary jurisdiction, they ought not to undertake matters to which they are not equal; that they cannot be too careful in seeing that their proceedings are correct, and that if they err, they are liable to the consequences of their error. In pursuing the powers entrusted to them by statutes such as that under which the defendant has acted, they ought to be narrowly and strictly watched. Their proceedings are summary; the party charged before *495] them has not the benefit of a jury to consider his case; and if *the conduct of the magistrates were not open to investigation, he might be subjected to great oppression.

The first question in the present cause is, has the defendant caused the imprisonment of which the plaintiff complains. Now, he issued a warrant under which the plaintiff was committed, as it were, in execution, and is therefore causa causans of the injury. Is the warrant good? No. It states no offence at all, but a mere civil injury, for which the remedy was by action at law. If there was a previous legal conviction, why did not the warrant of commitment pursue it? This is not like the case of a common assault, and the magistrate is much to blame who does not observe caution, and take a regular information in writing before he proceeds to convict. The defect in the warrant is not, as it has been urged, a mere clerical error, but a substantial insufficiency. I incline to think the warrant was void, at all events it was clearly illegal.

As to the judge's summing up, if in consequence of any misdirection a verdict

had been obtained against the facts and justice of the case, there might be ground for a new trial; but it was not so in the present instance; it is clear the plaintiff was entitled to something, and it is not for us to measure the amount of the damages.

GASELEE, J. I agree in all that has been urged as to the protection that ought to be extended to the magistrate in the honest discharge of his duty, and if the defect in this warrant of commitment were a mere clerical error, undoubtedly no action would lie. But *Rogers v. Jones* has clearly decided, that where the commitment varies substantially from the conviction, the conviction cannot be adduced in support of the commitment. My doubt arose from thinking that the commitment in the present case was sufficiently conformable to the conviction, but as it omits to state any offence, it cannot be sustained; [*496 for though a magistrate may draw up the conviction at any time, yet the warrant of commitment ought always to show an offence; and it is so easy to follow the words of the act, that it is better to hold in all cases that they shall be strictly pursued in the commitment, otherwise, transactions of this nature would be open to the observation that it was in the magistrate's power to supply a conviction and information conformable with the commitment, but inconsistent with the real facts of the case. I think, therefore, that this warrant was bad, and could not be amended. But I have great doubts on the rest of the case. The learned judge's direction was wrong in stating that the conviction was not conclusive evidence of the facts contained in it, and it ought to have been understood by the jury whether the offence had been committed or not, for this might have had a material effect on the amount of damages. The conduct of the plaintiff too was such as to make it appear that he almost courted the injury he complained of. Upon these and other grounds, I should have wished to grant the defendant a new trial, but the opinion of my learned brothers being different, this rule must be

Discharged.

*DOE dem. RICHARD NOWELL v. JOHN HENRY
ROAKE and Others.

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A devisor being seised of a moiety of certain lands in Surrey,—having by her own creation, a power of appointment over the other moiety, which she had purchased of her nephew, who succeeded her sister in the possession of it,—and having no other real estate,—devised all her freehold estate in Surrey to J. R., on condition that out of the rents and profits he should keep the whole in tenantable repair, and under limitations framed to keep the property as long in her family as possible:

Held, that this devise was, under the circumstances, a sufficient execution of the power, and that both moieties passed under it to J. R.

EJECTMENT to recover divers messuages and lands at Godalming in Surrey.

At the Kingston Spring assizes, 1823, before RICHARDS, C. B., the jury found a special verdict to the following effect:

That in 1749, Miles Poole died, seised of the tenements mentioned in the declaration, and that they descended to his two daughters and co-heirs, Sarah, wife of Thomas Scott, and Elizabeth, wife of Henry Roake, who entered, and were seised thereof:

That by deeds of lease and release of the 25th and 26th of April, 1750, between Scott and his wife, and Roake and his wife, of the first part, George Johnson of the second part, and William Hill of the third; the premises were conveyed to Hill in fee to make him tenant to the præcipe of a recovery, to the uses, as to one undivided moiety, of T. Scott and his assigns for life, remainder to his wife, Sarah Scott, for life, remainder to such uses as Sarah Scott, being covert or sole, should appoint by deed or will; and for want of such appointment to the use of all and every the child and children of T. Scott, on the body of his wife to be begotten, as tenants in common, and the respective heirs of

their bodies, and failing the issue of such child or children, to the use of every other such child or children equally, and if only one to that one in tail; remainder to the use of Elizabeth Roake, for life, remainder in like manner to her *498] children equally, remainder to T. Scott in *fee: and as to the other undivided moiety, to the use of Henry Roake for life, remainder to his wife for life, remainder to such uses as she being covert or sole should by deed or will appoint, and for default of such appointment, remainder to the children of Henry Roake on the body of his wife to be begotten (in like manner as the remainders to the children of T. Scott,) remainder to Sarah Scott for life, remainder to her children (in like manner as before,) remainder to Henry Roake in fee:

That the recovery was suffered accordingly in the 23 G. 2., and the parties entered and were seised accordingly:

That in 1758 Thomas Scott died without issue, and Sarah Scott married John Trymmer in 1763, who died in 1766:

That in 1775 Elizabeth Roake died, leaving Henry Roake her husband, and John Roake her son, but without having made any appointment:

That on the 6th and 7th of September, 1775, deeds of lease and release were executed between Henry Roake, John Roake, Sarah Trymmer, Benjamin Parnell, and James Morgan, by which, after reciting that Sarah Trymmer had agreed to purchase of John Roake his interest in the undivided moiety of the premises subject to Henry Roake's life interest, the moiety was conveyed to Parnell in fee to make a tenant to the præcipe in a recovery to the use of H. Roake for life, remainder to Sarah Trymmer in fee:

That Henry Roake died in 1777, and in 1783 Sarah Trymmer made her will in the words following, having at the time no other tenements besides those mentioned in the declaration: "I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, for *his life*, on condition that out of the rents thereof he do *499] *from time to time keep such estates in proper and tenantable repair; and on the decease of my said nephew, John Roake, I devise all my said estates, subject to and chargeable with the payment of 30*l.* a year to Ann, the wife of the said John Roake, for her life, by even quarterly payments, to and among his children lawfully begotten, equally at the age of twenty-one, and their heirs as tenants in common; but if only one child should live to attain such age, to him or her and his or her heirs at his or her age of twenty-one. And in case my said nephew, John Roake, should die without lawful issue, or such lawful issue should die before twenty-one, then I devise all the said estates, chargeable with such annuity of 30*l.* a year to the said Ann Roake for her life in manner aforesaid, to and among my nephews and nieces, Miles Thomas, John James, and Sarah Penfold, and Susannah Longman, or such of them as shall be then living, and their heirs and assigns for ever:"

That Sarah Trymmer, on the 4th day of September, 1786, died without revoking her said will, the said John Roake being then living and her heir at law:

That by indenture quadripartite of the 26th of April, 1787, between John Roake, nephew and heir of Sarah Trymmer, of the first part, M. P. Penfold, and other nephews and nieces, devisees in reversion of the second part, Benjamin Parnell of the third part, and Thomas Holland of the fourth, after reciting among other things the death of Sarah Trymmer in 1786, and that a recovery had never been suffered pursuant to the deed of the 27th of April, 1775, it was agreed that Thomas Holland should recover in a recovery to enure to the same uses as those in Sarah Trymmer's will, or such of them as were capable of taking effect:

That a recovery of one moiety was accordingly suffered:

*500] *That by an indenture of the 5th of November, 1789, between John Roake and Richard Nowell, Roake covenanted to levy a fine of the tene-

ments mentioned in the declaration, to Nowell and his heirs to the use of Roake and his heirs, and that a fine was levied accordingly :

That by indentures of lease and release of the 3d and 4th of July, 1797, between John Roake and Elizabeth his wife of the first part, Richard Nowell of the second, and John Radclyffe of the third, the premises were conveyed to Nowell in fee to make him tenant to the præcipe of a recovery to be levied for the purpose of barring estates tail, to the use of such person or persons as John Roake should appoint, and for default of appointment to John Roake in fee : That the recovery was suffered accordingly :

That by indentures of lease and release of the 20th and 21st of May, 1802, between John Roake of the first part, Richard Nowell of the second, John Atkinson of the third, William Smith of the fourth, and William Atkinson of the fifth, John Roake in consideration of 1220*l.* purchase money, appointed all the tenements in the declaration mentioned to John Atkinson, to such uses as Richard Nowell should appoint, and in default of appointment, to Nowell for life, remainder to J. Atkinson as a trustee to bar dower, remainder to the heirs of Nowell :

That John Roake died in 1803, leaving the defendants John Henry Roake, Thomas William Roake, Elizabeth Roake, and George Roake, his only children.

The questions to be discussed were,

First, Whether under Mrs. Trymmer's will the children of John Roake took contingent remainders, and were barred by the fine of Michaelmas term 30 G. 3.

Secondly, Whether as to a moiety, Mrs. Trymmer's will was a valid execution of the power of appointment reserved by the deed of the 26th of April, 1750, and whether the estate tail which John Roake took under that deed in default of appointment by the said Sarah Scott, was barred by [*501 the recovery suffered in Trinity term 37 G. 3.

But the argument was confined to the question on the execution of the appointment, the other question having recently been decided on this very will in the House of Lords.

This case was argued twice. By *Bosanquet*, Serjt., for the lessor of the plaintiff, and *Onslow*, Serjt., for the defendant, in Trinity term last, and by *D'Oyley*, Serjt., for the lessor of the plaintiff, and *Peake*, Serjt., for the defendant, in Michaelmas term. The question is examined at such length in the judgment of the court, that it will be sufficient here to give only the outline of the arguments employed by the learned counsel, which at the instance of the court were confined to the question, whether or not Mrs. Trymmer's life-estate, over which she had a power of appointment, passed to her devisee under the terms employed in the will.

On the part of the lessor of the plaintiff it was contended, that in order to make a devise operate as an execution of a power, there must be either a reference to the power, or a description of the thing devised, (*Sir Edward Clere's* case, 6 Rep. 17 b; *Buckland v. Barton*, 2 H. Bl. 136; *Andrews v. Emmott*, 2 Bro. C. C. 297; *Doe d. Hellings v. Bird*, 11 East, 49; *Jones v. Currie*, 1 Swanst. 66; *Bennett v. Aburrow*, 8 Ves. jun. 609; *Bradby v. Westcott*, 13 Ves. jun. 445; *Powell v. Lordale*, 2 B. & A. 291; *Jones v. Tucker*, 2 Merivale, 533; *Sloane v. Cadogan*, Sugd. Pow. 282, 2d edit.,) or the will must be inoperative unless the thing devised be allowed to pass: *Standen v. Standen*, 2 Ves. jun. 589: and that the principle to be collected from [*502 all these cases was, that an express intention must appear to pass the lands which were the object of the power; that it was not sufficient to show merely an absence of intention not to pass them; and that where, as in the present case, the deviser had other lands on which the devise could sufficiently operate, there was no pretence for applying it to the lands subject to the power, for the mere purpose of rendering it availing. Here there was no reference to the power: no description of the land in question: the deviser had devised *her*

land; and she *had* land at the time to satisfy the terms of the devise, which could not be extended to other land which was not *hers*, but over which she had no more than a naked power of appointment.

On the part of the defendant, J. H. Roake, it was urged, that an intention to pass the land in dispute was plainly apparent from the circumstance of the annexed condition to keep in repair the whole property, which condition the devisee could not perform unless he were in possession of the whole; and that this intention was the more apparent when it was considered that the two properties in Mrs. Trymmer's possession had originally been united and comprised under one title. In addition to the cases cited on the other side, *Ex parte Caswall*, 1 Atk. 559; *Morgan d. Sermon v. Sermon*, 1 Taunt. 289; *Langham v. Renny*, 3 Ves. jun. 467; *Madison v. Andrews*, 1 Ves. 57, and *Dillon v. Dillon*, 1 Ball & Beatty, 77, were referred to; but the principle with respect to the manifestation of intention seemed to be agreed upon, and the main question was, whether or not it had been sufficiently manifested in the present instance.

*503] In reply it was argued, that the condition to repair did not alter the effect of the devise, because it applied only to the thing devised, which again raised the first question,—of what that consisted? But supposing it to have been intended that the devisee should keep the whole in repair, there was nothing illegal or absurd in devising or letting estate A. upon condition that the lessee or devisee should keep in repair estates A. and B. As to the difficulty of repairing an undivided moiety where one of the tenants would not accede to the repair, the party might have a writ de reparatione faciendâ (Fitz. N. B. 127) or sue for a partition.

The Court having taken till this term to consider, judgment was now delivered by

BEST, C. J. If we had felt ourselves at liberty to decide this case according to what we believed to be the intent of the testator, shown by such evidence as satisfies courts of justice on ordinary wills, we should not have so long delayed our judgment.

We know that the titles of many estates depend on powers, and were, therefore, anxious not to disturb the rules which have been prescribed for the determination of the degree of proof that is necessary to manifest the intent to execute them.

The special verdict raises two questions.—First, whether the remainders to the children of John Roake are barred by fine? This question having been already decided by the House of Lords in the affirmative, we did not feel ourselves at liberty to reconsider it, and would not permit it to be argued at the bar.

The second question is, Whether the will of Mrs. Trymmer be a valid execution of the power which she reserved to herself in the deed of 1750? To decide this question we must first ascertain what evidence of intent to execute a power the law requires: Secondly, *whether Mrs. Trymmer's will
*504] contains the requisite proof of such an intent, considered with reference to the particular state of this property. She was seized of one undivided moiety of the estate, and had a power of disposing of the other undivided moiety. We are not aware of any decision on such a case, but we think this circumstance gives an effect to that part of her will which directs the devisee to repair the premises devised, in favour of its being a good execution of the power.

It has long been settled, that an express declaration of the intent to execute a power is not necessary; on the other hand, no terms, however comprehensive, although sufficient to pass every species of property, freehold and copyhold, real and personal, will execute a power, unless they demonstrate that a testator had the power in his contemplation, and intended by his will to execute it.

It has often been said that a power is not executed, unless the power or the estate be referred to by the will, or the will can have no effect, except as an

execution of the power. We are not disposed to say that these are the only cases, and we have high authority for saying they are not. They are only put as instances of the strong and unequivocal proof that is required: but if there were a rule that courts of law are only permitted to hold a power well executed, in these instances; we should say that this case came within it, for we think the estate is referred to. It is proper that I should, as shortly as possible, review the principal authorities on this subject. In the *Earl of Darlington v. Pulteney*, Cowp. 260, Lord MANSFIELD says, "A power being a new thing, and the courts of law having no equitable precedents in point to guide them, compared them at first to conditions, which they are not at all like, and consequently held, that they should be construed *strictly*. They looked on them in the light of powers vested in a third person, over the estate of another man, whereas, in fact, they are only a different species of ownership, and enjoyment of property; but a long series of precedents has now settled in the Court of Chancery, that in the construction of powers, whenever the power is executed for a meritorious consideration, namely, as a provision for a wife or a child, or for the benefit of creditors or purchasers, there the precise form prescribed for its execution need not be strictly pursued." The doctrine of favourable construction, a doctrine which, by supporting some few titles, renders all doubtful, is here limited in its application to cases that are most highly favoured; to cases in which a court of equity would supply the surrender to the use of a will. In all other cases, so much strictness of proof is necessary, that it required the aid of the legislature (59 G. 3, c. 168,) to make the attestation of sealing and delivery, evidence that the signature which was found on the instrument sealed and delivered was that of the party sealing and delivering.

In *Sir Edward Clere's case*, 6 Co. 17 b, Harwood, seised of three acres of land, held in capite, made a feoffment of two of these acres to the use of his wife, and afterwards made a feoffment by deed of the third acre to the use of such persons as he should by his last will limit and appoint. Afterwards, he devised the third acre to one in fee. The question was, whether the devise was good for all the third acre, or for only *two parts* of it. It was resolved, that when Harwood had conveyed two parts to his wife by act executed, he could not, as owner of the land, devise *any part* of the residue by his will; "therefore, the devise ought of necessity to enure as a limitation of a use, otherwise the devise would be *utterly void*." The principle on which this judgment stands is, that no *part of the third acre* could be devised; the will would have been wholly inoperative if it had not been held to be an execution of the power. This was the view taken of *Clere's case* by Lord HOBART.

In the great case of *Commendams*, Hobart, 140, his lordship says, "though a party do not make an express declaration, yet if his act *do import* a necessity to work by his power, or else to be *wholly void*, the benignity of the law will give way to effect the meaning of the party."

In *Scrope's case*, 10 Co. 144, it is stated, that Scrope being seised in fee, covenanted to stand seised to the use of himself, his wife and daughter, for their lives, then to the use of the daughter in tail, with remainders over, and a proviso, that after payment of certain scheduled debts, he might revoke these uses, and declare new uses. His wife died, and on his second marriage, he covenanted to stand seised to the use of himself and his second wife for their lives, and then to the use of his right heirs. He does not by this deed expressly revoke the uses created by the first deed, but it was held that the second deed was so manifestly repugnant to the first, that the uses in the first deed were annulled, without any express revocation; and Lord Coke says, "*Quia non refert an quis intentionem suam declaret in verbis an rebus ipsis vel factis.*" In this case the second deed would have been entirely inoperative, if it had not, by implication, revoked the uses in the first; but the rule given by Lord Coke is larger than that which has been deduced from the decision in *Clere's case*. Lord Coke's rule will be

complied with if the intention to execute a power be *unequivocally manifested* by any circumstances occurring in the case, or any act of the owner of the

*507] power, without requiring any specified overt acts of such intention.

In *Jenkins v. Keymis*, 1 Lev. 150, the father, tenant for life, and his son, tenant in tail, by fine and recovery settled the lands, reserving a power to the father to charge *all* the premises, with the payment of 2000*l.*, by deed in writing. Father and son afterwards, by deeds of lease and release, without reciting the power, charged *part* of the lands with the payment of 2000*l.* and interest.

The court held, that although the power was not recited, it was a good execution of it, according to *Clere's* case. This is an express recognition of the authority of *Clere's* case. The judgment proceeds on the principle on which that case was decided. The lease and release would have been inoperative if they had not been held to be an execution of the power in the settlement.

Clere's case is again referred to by HALE, C. J., and RAINSFORD, J., in *King v. Melling*, 1 Vent. 225, and the doctrine confirmed, that if there be any legal interest on which the deed can attach, it will not execute a power.

In *Guy v. Dormer*, 1 Sir T. Raym. 295, the estates were settled, first, to permit the settler and after him his wife, to take the profits during their lives, and then for Robert Dormer in fee, with a power of revoking the uses by any writing, in which the settler should in *express terms* declare his intent to revoke. He made a will, and gave the fee to William Dormer instead of Robert Dormer. It was said at the bar, that notwithstanding the words by *express terms* in the deed, as the will could not consist with the uses in the deed, the latter was a revocation of the former; and the judgment was, that the uses in the deed were revoked. This case stands on the principle laid down

*508] in *Scrope's* case, that the intent to revoke is demonstrated by the inconsistencies of the last disposition with the uses in the previous deed.

There is a case in 1 Vesey sen. 58, of *Maddison v. Andrews*, where Robert Maddison made a voluntary settlement on his brother John, with remainder to his sisters, but he created a term of 1010 years, vested in trustees; reserving to himself a power, in case he died unmarried and without issue, to charge, limit, or appoint any sums not exceeding 1000*l.* He by his will charges all his real and personal estates with the payment of his debts and legacies, and gives a legacy of 300*l.* to the children of his sister Sarah. It was insisted, that the 1000*l.* which Robert had power to charge, should be assets for the payment of the legacy. Lord HARDWICKE was of opinion that it should; for being a power reserved by the *absolute owner* of the estate making a voluntary settlement on his brother, it should be *construed liberally*, being a reservation of part of the ownership. "Then, as to the execution," says the chancellor, "he has used the word *charge* which is in the power, nor is there any occasion for referring to the power, if he *does it in substance*, as in *Sir Edward Clere's* case." This case is not reported in Atkins, a more accurate and a more discreet reporter than Vesey. Although Lord HARDWICKE talks of construing these powers liberally, he founds his decision on this, that the power is referred to in the will; for by the deed it was a mere power to *charge*; and in the will he uses the word *charge*. The use of a term in the power he considers as a reference to the power. Then he refers to *Clere's* case, from which I infer (although the report does not tell us so) that the settler had settled all his real property on his brother by the deed, and then the will would have been inoperative as to real property, if it had not been held to be an execution of the

*509] power; for there is nothing decided in **Clere's* case, but that the will was to be held to be an execution of the power, because it would otherwise have had no effect. This will speaking of *real property*, if he had no other *real* property but that which was settled, must refer to that property.

In *Ex parte Caswall*, 1 Atk. 549, Sir George Caswall having surrendered a copyhold estate to trustees, and reserved a power of appointment, gave by his

will *all* the rest, residue, and remainder of his effects, real and personal of what nature, kind, and quality soever unto George Caswall. Lord HARDWICKE says, "though a man may execute a power without taking the least notice of it, yet it is necessary that he should mention the estate that he disposes of, and must do such an act as shows that he takes notice of the thing which he has a power to dispose of. He had other lands on which the devise might be satisfied." Here we have the same judge who decided the case in Vesey, declaring that a will of the creator of a power does not execute it unless he mentions the estate, and does such an act as shows he takes notice of the thing which he had a power to dispose of. In *Probert v. Morgan*, 1 Atk. 440, Lord HARDWICKE speaks to the same effect as in *Ex parte Caswall*.

In *Andrews v. Emmot*, 2 Brown, 297, John Andrews conveyed 3000*l.* to trustees for a marriage settlement, reserving to himself, in case there were no children, a power to appoint this sum to whom he pleased. He having no children, by his will gave all the rest and residue of his moneys and personal estate of what nature, kind, and quality soever. The question was, whether these words executed the power. Lord KENYON refers to *Purker v. Kett*, 12 Mod. 467, from which he extracts these words, which he expresses his approbation of: "When one has an authority, and does an act which can be good no other way but by virtue of that authority, it shall be understood to be done by virtue of his authority: but where one has an interest and an authority together, and does an act generally, it shall be construed in relation to his interest, and not to his authority." This is the rule given by *Clere's case*. "Then," says Lord KENYON, "does this devise of the residue necessarily refer to the power when the testator had other property;" and he held that the power was not executed. There was an appeal to Lord THURLOW, who confirmed the decree, and said that to execute the power it must be impossible to impute to a testator any other intention than that of executing it, and that the doctrine is not carried by any case further than this. The only distinction between a power over personal property and one over real is, that in the former the courts will not inquire whether the testator had other property to satisfy the terms of the will; in the latter they will allow of such an inquiry. This distinction shows how complete the evidence of intent to execute the power must be. The possibility that a testator might contemplate property that he might acquire between the time that he makes his will and his death, prevents a general disposition from operating as an execution of a power of personal property, although at the time he makes his will he has no property on which it can attach.

In *Standen v. Standen*, 2 Ves. jun. 594, Lord LOUGHBOROUGH says, "By her will she gives all her estate and effects." It is hard to say, that using that expression she did not mean to include this which is as absolutely hers as any other part of her property. This reasoning of Lord L. is supported by no previous authority, and has been objected to in many subsequent cases. The judgment, however, is put by him on a sound principle, namely, that the testatrix had no other real estate.

In *Langham v. Renny*, 3 Ves. jun. 467, Lord ALVANLY held, that a will in which the testator declared his purpose to dispose of his estate and effects which he had or was interested in; but not taking any particular notice of stock in the funds, over which he had a power, did not execute such power.

His lordship expresses himself inclined to construe powers liberally, and declares his approbation of *Standen v. Standen*, but whether of the judgment only or of the reasoning of Lord LOUGHBOROUGH, does not distinctly appear.

In *Nannock v. Horton*, 7 Ves. 391, the testator having power to dispose of 4000*l.* consolidated bank annuities, by his will gave to Eliza Lawes 2000*l.* consolidated bank annuities.

The lord chancellor said, "there is nothing that can be stated as having any reference to the power, except the words, three per cent. consolidated bank

annuities;" and he concludes his judgment in these words: "In this will there is nothing that refers to the power, nothing *necessarily* descriptive of the property over which it existed; and, therefore, whatever *might have been the intention*, I am bound by the authorities to say the testator did not mean to affect any property but what was his own." This is an authority, that no proof of intention short of that which amounts to moral demonstration will be sufficient.

In *Bennet v. Aburrow*, 8 Ves. 609, William Aburrow, the settler, reserved to himself a power of appointment to 3000*l.* consolidated bank annuities. Sir WILLIAM GRANT says, "it is always a question of intention, whether the party meant to execute the power: this intention may be collected from other circumstances besides reference *to the power; as, that the will includes *512] something that the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative unless applied to the power." Although he says it is a question of intention, yet he requires the same evidence of that intention that the previous decisions state to be necessary in such cases.

In *Bradby v. Westcott*, 13 Ves. 453, Sir WILLIAM GRANT says, "I agree that the decision in *Standen v. Standen* is right. *I dissent only from the argument on which the lord chancellor proceeds.*" Again, "If I find that she is speaking of the subject of her power, an express reference is not necessary."

In *Jones v. Tucker*, 2 Meriv. 533, Sir WILLIAM GRANT expresses himself to the same effect.

In *Jones v. Currie*, 1 Swanst. 66, Sir THOMAS PLUMER says, "The distinction, notwithstanding some expressions in *Standen v. Standen* being now established between property and power, these words containing no *direct* reference to any particular fund,—nothing in description to enable the court to collect her intention to execute her power,—are not sufficient to designate with *due* certainty property not her own, but of which she was empowered to dispose."

From a full consideration of all these cases, we are of opinion, that a will need not contain express evidence of an intent to execute a power. Nor are a reference to the power, or the estate in the will's being inoperative unless it executes the power, the only circumstances in which a court will presume an intent to execute it; but we say in the language of Lord THURLOW, in *Andrews v. Emmott*, that the intent to execute must be so clearly manifested by the will, that it is impossible to impute any other intention to a testator than that of executing it.

*513] We think it impossible to impute any other intention to Mrs. Trymmer than that of executing the power she had reserved to herself in the estate in question; and we think that intention is demonstrated by every part of the will, and particularly by a reference to the estate over which she had this power.

Mrs. Trymmer being seised of one undivided moiety, and having a power over the other undivided moiety, of which power she was the creator, gives all her freehold estates in the city of London and county of Surrey, or elsewhere, to her nephew John Roake. This is not a description of her interest in the estates, but of the estates, and shows an intent to pass all the property that she had any right to dispose of. I should incline to think these words referred to both parts of this property; but this devise is on condition, that out of the rents thereof, that is, out of the rents of the entire property the devisees shall from time to time keep *such estates* in proper and tenantable repair. He could not keep an undivided moiety in repair, he must repair the whole, or have the whole without repair. These words, therefore, clearly refer to the entire property; and if they do, the entire property is referred to in the devise; for the estates to be repaired were such or the same estates that she had devised.

It seems to me, therefore, that the estate subject to the power is referred to. She had no other estate in the county of Surrey but those mentioned in the

declaration, and of which she was tenant in common with trustees appointed by herself for the preservation of the power which she had over the other moiety.

There is nothing in the will to rebut the irresistible inference of intention arising from these circumstances. On the contrary, her whole conduct, as shown by the special verdict, proves that she wished to keep the estate united. She purchased the reversion of the moiety *after Henry Roake's decease; she is anxious for its being kept in good repair, and continued it [514 as long as she could continue it in her family.

It is absurd to suppose that she was desirous of preserving her sister's moiety, and cared nothing about her own. For these reasons we think judgment should be for the defendant.

SINCLAIR and Another, Assignees of PROCTOR, a Bankrupt,
v. STEVENSON.

The bankrupt was in the possession of property as apparent owner, under an instrument, which, though in appearance a lease, was, in effect, a contrivance to secure the seller of the property the price to be paid, together with 10 per cent. interest on the amount until it should be paid:

Held, that the bankrupt's having obtained the apparent ownership by means of this fraud, would not prevent the assignees from recovering it under the statute of James 1.

TROVER for a plant and the various utensils of a distillery, which the plaintiffs claimed, either as having been absolutely sold by the defendant to Proctor, or as having been in Proctor's possession, and at his disposition at the time of the bankruptcy, with the consent of the defendant.

This claim the defendant resisted on the ground that he had only leased the articles in question to Proctor for four years, and had repossessed himself of them by virtue of certain conditions contained in the lease.

At the trial before BEST, C. J., Middlesex sittings after Michaelmas term last, there was conflicting evidence as to the manner in which the property came into Proctor's possession; it appeared, however, that the defendant, who had just relinquished the business of distiller, was willing to have disposed of the property in question for 12 or 1300*l.* ready money, but that Proctor being unable to raise so large a sum, the concern was transferred *to him, [515 under a deed bearing date January 31, 1823, by which, in consideration of 300*l.* paid down, and of the rents, reservations and covenants contained in the deed, the defendant demised to Proctor a messuage and warehouse, and all the coppers, boilers, vats, utensils, implements, and fixtures belonging to the premises, and the trade and business of a distiller, carried on in the premises, to hold for four years, paying rents as specified in the deed, but which varied, so as to cover 1200*l.* and a sum equivalent to 10 per cent. interest, by instalments, in the four years. Proctor was to repair and insure the premises, and if the rent were unpaid, or the plant and utensils let, or Proctor became a bankrupt, or if default were made in the payment of a sum of 494*l.*, secured to the defendant by a bill of Proctor's, dated the 1st January, 1823, and payable four months after date, (which bill was given for a stock of spirits transferred by the defendant to Proctor,) then the whole of the four years rents were to be considered as presently due, and the defendant was to take possession of the plant and utensils, sell them, and apply the produce in satisfaction of the rents remaining to be paid, (deducting 5 per cent. for immediate payment, and an additional 5 per cent. for the then occupation of the plant and premises,) and of what remained unpaid of the 494*l.*, and to pay over the residue to Proctor. The defendant covenanted, if the rents were paid, and Proctor's covenants observed, to assign to Proctor at the end of the four years the plant and utensils demised to him. Proctor became bankrupt in May, 1823, and the defendant immediately took possession of the plant and other utensils.

The jury, under the direction of BEST, C. J., came to the conclusion, that

the deed of January 31, 1823, was not a mere lease, but a contrivance to obtain 10 per cent. for the forbearance of a sum in which Proctor had *become indebted to the defendant for the transfer of the concern ; and they found a verdict for the plaintiffs.

Vaughan, Serjt., now moved for a new trial upon several questions of fact, and also on the ground, that the transaction had not been usurious, but that the defendant had repossessed himself of the premises under the provisions of a lawful deed. He urged that there was nothing usurious in selling for 15*l.* upon credit goods which the seller would have parted with for 10*l.* ready money ; *Spurrier v. Mayoss*, 1 Ves. jun. 527 ; that according to the terms of this deed no debt was created, inasmuch as there was no time at which the defendant could have insisted on the whole amount which Proctor was to pay for the premises ; but that supposing the transaction on the part of Proctor to have been fraudulent, the assignees could not claim under the statute of James goods of which the bankrupt had obtained the disposition and control, as apparent owner, by means of a fraud.

PARK, J. Upon the question, whether or not the goods sought to be recovered in this action, were at the time of the bankruptcy in the order and disposition of the bankrupt as apparent owner, with the consent of the true owner, it is not necessary under the statute of James to go into minutiae respecting the title to property ; and that Proctor was in possession of these goods as apparent owner with the consent of Stevenson, cannot be doubted after an inspection of the deed of the 31st January, whether that deed be esteemed valid or not.

BURROUGH and GASELEE, Js., concurred.

*517] *BEST*, C. J. The plaintiffs in my opinion might have left their case on the statute of James. The articles, which were the subject of the action, were left in the order and disposition of the bankrupt at the time of his bankruptcy, by the defendant, and so passed to his assignees. But it was insisted by the defendant, that the possession, order, and disposition were obtained by fraud. There was no pretence for saying there was any fraud, and the jury very properly negatived fraud in the bankrupt. The fraud insisted on was, that the bankrupt when he made his bargain, knew that he was not of ability to perform it ; but there was strong evidence, that if he had not traded beyond his capital and had not been much imposed on in his contract with the defendant, he would have been able to have discharged all his debts. But if a person purchase a house and the utensils of a trade, knowing that he is not able to pay for them ; if possession be delivered to him, does not the property in these utensils pass to him, and will they not become the property of his creditors in the event of his bankruptcy ? At all events, when the possession of goods has been acquired under such circumstances, and the bankrupt has kept that possession for three or four months, and appeared as the visible owner, they will pass to his assignees under the statute of James. The plaintiffs, however, were not content with this case, but insisted that the defendant had no right to resume the possession, because the deed under which he asserted this right to possession was usurious. Although I thought this additional case unnecessary, I left it to the jury to consider, whether the deed did not in every clause of it, show that the real transaction was a loan of 1200*l.* for four years, at an interest of 10 per cent. I told the jury, that if that was the real character of the transaction, although the colour *518] of a letting of the utensils was given it, yet it was usurious and void, and the defendant could not resume possession under it.

The jury, on considering the deed and the parol evidence, which was adduced to prove the wrong, expressly told me, they thought the deed was not a lease, but an instrument contrived to obtain 10 per cent. interest for the forbearing the payment of the purchase money. I was referred to the case of *Spurrier v. Mayoss*, but thought that case was not like the present. The purchaser in that case, if the purchases had been completed at Michaelmas, was only to pay 5

per cent. on the money left unpaid when he was let into possession. If he did not complete his purchase at that time, it does not appear that he ever would be required to complete it. It was from that time a case of letting and renting, and nothing like a loan of money; he was required to pay no more rent than the premises had been let for before; and the lords commissioners were all of opinion it was a conscientious case on the part of the owner of the house. In the present case it was from insolvency only that the defendant could lose the stipulated instalments, and then if the deed was valid, he was to get back his property.

The conduct of the defendant was in my opinion and in the opinion of the jury, most avaricious and most unconscientious.

Rule refused.

SAWARD v. ANSTEY.

[*519]

The defendant purchased an estate charged with an annuity to M. S., and, as part of the bargain, covenanted to pay the annuity, and to indemnify the vendor against any charge in respect of it.

Breach, in a declaration on this covenant, non-payment of the annuity;—without adding that the vendor had been thereby damnified:

Held, sufficient on demurrer.

COVENANT. The declaration stated, that, by an indenture between the plaintiff and defendant, (after reciting in substance, among other things, that the plaintiff had in 1820 conveyed to the defendant in fee, for the sum of 4460*l.* two farms in Essex, containing 230 acres, subject to four several annuities of 100*l.* each, thereafter mentioned; which farms were late the inheritance of Michael Saward, who died in 1815, and devised them to the plaintiff, his son, upon condition that he should pay yearly during the lives of M. S.'s four daughters, the clear yearly rent of 100*l.* to each of M. S.'s four daughters, and charged the farms with the payment of the said annuities accordingly; and after reciting, that upon the before-mentioned purchase it was agreed that the defendant should enter into a covenant for the payment of the said four several annuities, and for the indemnity of the plaintiff respecting the same,) the defendant in consideration of the premises did thereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the plaintiff, his heirs, executors, &c., that the defendant, his heirs, executors, &c. should and would from time to time, and at all times thereafter, well and truly pay or cause to be paid unto the person or persons who should for the time being be entitled to the same, the said four several annuities of 100*l.* by the said will of the said Michael Saward bequeathed to his four daughters, and thereby charged on the said farms, at such times and in such manner and form as the same were and are by the said will directed to be paid; and should and would from time to time, and at all times thereafter, save, [*520 defend, keep harmless, and indemnify the plaintiff, his heirs, &c., of, from, and against all and all manner of action and actions, suit and suits, cause and causes of action and suit, and all claims, demands, and pretensions whatsoever, for or on account of the same annuities respectively, or any part thereof.

Breach, non-payment of the annuities. Demurrer, assigning for cause that the covenant in question was one entire covenant, entered into for indemnifying the plaintiff against actions in respect of non-payment of the annuities; and that the declaration had not alleged that the plaintiff had been damnified by the defendant's non-payment.

Peake, Serjt., in support of the demurrer, argued that the meaning of this covenant must be collected from considering the whole of the deed in which it was found, the subject-matter of the contract, and the situation of the parties.

Taking all these into consideration, it amounted to no more than a covenant to indemnify. But as such, it afforded no cause of action against the defendant,

since the testator had charged the lands sold by the plaintiff with the annuities; the plaintiff was never personally liable to the payment of them, and therefore had never been damnified by the non-payment. In the construction of wills, the question whether or not a devisee should take an estate for life or an estate in fee, often turned on the point whether the land or the devisee were liable to the payment of charges; so in the construction of the present covenant, when it was ascertained that the land was chargeable, and not the plaintiff, it must be inferred that it was not intended the defendant should pay the annuity. At all *521] events, as the clause of indemnity formed part of the covenant, *it ought to have been averred that the plaintiff was damnified.

Bosanquet, contra, was stopped by the court.

BEST, C. J. The question on the construction of this covenant has arisen out of a clause of a will recited in the deed which contains the covenant. The clause in this will by which the property purchased by the defendant was devised to the plaintiff is as follows: "I give and devise unto my son" the premises in question, "to hold to my said son, his heirs and assigns, *upon condition* that he and they shall pay yearly during the natural lives of my four daughters, by two equal half-yearly payments, the yearly rent or sum of 100*l.*, free from all charges."

These annuities were only charges on the estate, and not personal charges on the owner; until the statute of the 4 G. 2, c. 2, therefore, they could not have been distrained for; that statute has now given a distress to the owners of rents seck. But although these were not personal charges, and the devisee after he had parted with his estate could not be compelled to pay them, and required no indemnity for his own security; he might have good reason to require a covenant from the purchaser that he would pay them, and he required from the defendant a covenant in the following words; namely, that he, "the said defendant, his heirs, executors, and administrators should and would from time to time, and at all times thereafter, well and truly pay or cause to be paid unto the persons who should for the time being be entitled to the same, the said four several annuities of 100*l.* by the will of the said Michael Seward bequeathed to his four daughters, and thereby charged on the said premises."

*522] "The annuitants are his own sisters. He might consider that their interests were safe so long as the property remained in his own hands, but that when it passed into the hands of a stranger, they might be compelled to resort to a dilatory and expensive process, and that from alterations in the value of property or the insolvency of a tenant, a sufficient distress might not be found on the premises; he might therefore think it prudent to secure them, as he has done by a personal covenant to pay.

I agree that in construing this covenant we are to look to the subject-matter of the contract, and to consider all the terms of the deed; I admit that a positive covenant may sometimes be controlled or qualified by other clauses in the deed.

It has been insisted that the clause of indemnity controls this covenant. It cannot be said that it is to control; if it is to have any effect at all, it must erase the covenant to pay the annuities from the deed. The plaintiff himself could not be damnified by non-payment. If therefore the clause of indemnity were to limit the covenant for payment to cases where the plaintiff was himself damnified by non-payment, it would destroy its effect altogether. When there is a positive general covenant in a deed, that covenant is not to be controlled by subsequent clauses, unless, as Lord ALVANLEY says in *Hesse v. Stevenson*, 3 B. & P. 565, "the inference is irresistible that the parties could not intend to make a general covenant." I cannot infer from this deed that it was the intent of the parties to restrain or qualify the positive covenant to pay. The covenant for indemnity is useless, but utile per inutile non vitiatur, and the plaintiff is clearly entitled to judgment.

*PARK, J. It is clear that the estate was sold for a smaller sum in consideration of the defendant's undertaking to pay the annuities. [*52?

BURROUGH, J. It was part of the contract that the purchaser should pay the annuities charged on the land under Michael Seward's will, and there is no retence for saying such payment did not enter into the consideration for the sale of the premises. This is not like the common case of covenants for title, in which subsequent words have sometimes been holden to control those which preceded; though perhaps the demurrer has been occasioned by some such idea.

GASELEE, J., concurred.

Judgment for plaintiff.

HEDGES v. CHAPMAN and COUSENS.

Trespass for false imprisonment. Plea, That a horse of A.'s having been taken out of A.'s close without his consent, and having been found in plaintiff's stable, and A. having grounds to believe, and believing that the horse had been stolen by plaintiff, gave charge of the plaintiff to a constable, and requested him to take the plaintiff into custody, to be examined by a justice touching the offence; whereupon the constable and A., in his aid and by his command, laid their hands on the plaintiff, who resisted, and assaulted the constable and A., whereupon they defended themselves, and took the plaintiff and conducted him to a police office: *Held*, ill.

TRESPASS for assault, battery, and false imprisonment.

Pleas, first, general issue; second, *actio non*, because a horse of Chapman's had, without his consent, been taken out of his close, and forced over a fence surrounding it: That Chapman, for these reasons, believing the horse to have been stolen, and finding it in a stable of *the plaintiff, and having strong [*524 grounds to believe, and believing that the horse had been stolen by the plaintiff, requested Cousens, who was a constable, to retake the horse, and gave charge of the plaintiff to Cousens for having feloniously stolen the horse, and requested Cousens to take the plaintiff into custody, and to convey him and the horse before a justice of the peace, in order that the plaintiff might be examined by the justice touching the offence, and he further dealt with according to law; and therefore Cousens as such constable, and Chapman in his aid and assistance, and by his command, just before the time when, &c., attempted to retake the horse, and gently laid their hands on the plaintiff in order to take him into custody on the charge and for the purpose aforesaid, whereupon the plaintiff and divers servants of his, with force and arms, violently resisted the attempt of Cousens and Chapman so acting in his aid and assistance, and by his command, to retake the horse, and take the plaintiff into custody; and the plaintiff and his servants then and there with force and arms assaulted Cousens and Chapman, and would have beat, wounded, and ill-treated them, if they had not immediately defended themselves, whereupon they did defend themselves, and did overcome the resistance of the plaintiff and his servants, and did retake the horse, and did seize and lay hold of and take the plaintiff into custody for the said charge of felony, and conducted him as a prisoner to the police office, to be there examined, and he was there examined by a justice of peace touching the charge, and was upon that occasion unavoidably imprisoned for the time mentioned in the declaration; and if any damage was done to the plaintiff the same was occasioned by the resistance of the plaintiff to Cousens, and Chapman acting in his assistance, and by his command: without this, &c.

*There were several other pleas to the same effect, to all of which [*525 there was a general demurrer and joinder.

Vaughan, Serjt., in support of the demurrer.

The plea is ill, as far as concerns Chapman, for a party cannot justify the taking another on suspicion of felony, unless on the plea he show a reasonable cause of suspicion, (*Mure v. Kaye*, 4 Taunt. 44; Hawk. P. C. b. ii. c. 12, s. 18.) which is not made out here; and if the plea be bad in part, as to Chapman,

it is also bad in the whole, *Duffield v. Scott*, 3 T. R. 376; 1 Wms. Saund. 28, note. As to the allegation that Chapman was acting in support of the constable, it amounts to nothing, for it was he who set the constable in motion, so that the affair was the same as if it had been conducted by Chapman alone; and Chapman having ventured to arrest without making out a sufficient ground of suspicion, is, for so doing, liable to an action of trespass, *Stonehouse v. Elliott*, 6 T. R. 315.

Taddy, Serjt., contra. A reasonable ground of suspicion is indicated in the plea, in the circumstance that the stolen horse was found in the plaintiff's stable, Year Book, 7 H. 4, fol. 35. And Chapman is not the first mover, but acting in aid of the constable. The circumstance that Chapman pointed out the plaintiff to the constable, and stated that the theft had been committed, or even the circumstance of his desiring the constable to take the plaintiff into custody, would not constitute Chapman, in point of law, the first mover in the matter of the arrest; for the constable has a discretion, and is not bound to act on every information he receives; but when he decides upon acting, he becomes the first mover and principal, and all who assist him are protected by his official authority. Chapman, however, only *gave information, not a command to take; and if the plea had been that a charge of felony had been made against Hedges, and that the constable, when arresting him on that charge, called on Chapman to assist, no objection could have been raised: this plea is in substance the same; for whether the charge were made by Chapman or a third person, the arrest is the thing complained of in this action, and in that the constable is the only responsible mover. The making the charge in the first instance, if a wrongful act, could only be complained of in an action on the case, for having made the charge, and not in trespass, for the consequent arrest. (Per ASHHURST and BULLER, Js., in *Morgan v. Hughes*, 2 T. R. 225.) In *Stonehouse v. Elliott* the defendant, and not the constable, first made the arrest, and in *Mure v. Kaye* no cause of suspicion was stated on the plea.

BEST, C. J. It is quite clear, whether a felony has been committed or not, that if an individual charges a constable to take a party into custody, no action will lie against the constable, because in such a case, it is his duty to act, and not to deliberate. But the individual who is not bound to act ought not to arrest, unless there be reasonable ground of suspicion. If, therefore, the constable had pleaded separately, that Chapman charged him with the custody of the plaintiff, that plea might have been good. But both the defendants join in the same plea, and say that because Chapman had had a horse taken out of his field,—not, feloniously taken,—and because it was found in the plaintiff's stable, he ordered the constable to take the plaintiff into custody. Unless that plea amounts to a justification for both the defendants, it falls to the ground, for if it *is bad in part, it is bad in the whole; but it is clearly no justification for Chapman, and, therefore, cannot be sustained. The case of *Stonehouse v. Elliott* decides that trespass will lie under such circumstances, and as to the supposed distinction, that in that case, that the party who made the charge first seized the individual charged, there is no difference in law between seizing a person and ordering him to be seized; that was the case here, and this justification ought to go, not to the subsequent scuffle, but to the original imprisonment. The constable has unadvisedly joined in his defence with a party who has stated no justification on the plea.

The rest of the Court concurring,

Judgment was given for the plaintiff.

WOODLEY and Another v. BROWN and Another.

Returns of sales of corn made under 1 & 2 G. 4, c. 87, are not conclusive evidence to show the parties to whom the corn was delivered.

THE plaintiffs were corn-factors, the defendants lightermen and warehousemen.

On the 9th of August, 1824, according to the testimony of the plaintiffs' witnesses, which the jury believed, the plaintiffs sold a quantity of corn, then lying in the river Thames, on board three different vessels, to one Loud, who agreed that it should remain under the plaintiffs' care. The plaintiffs then called to the defendants, told them that Loud had bought the wheat, that it was to be landed, but that the defendants were to know no other person in the transaction besides the plaintiffs; in this the defendants acquiesced, and the delivery notes were handed to them. These delivery notes were addressed to the captains of the vessels, in the following form :—

Corn Exchange, 9th August, 1824.

Captain _____ }
of the _____ } Lying at Aldermans.

Deliver for Messrs. Brown and Young.

} Quarters, wheat,

Signed,

By the seller.

There were three delivery orders, which were as follows :—

1st. "Deliver for Brown and Young, for Woodley and Co., 127 quarters; no refusal, unless a satisfactory reason given for such refusal, the day after the date."

2d order, for a further quantity, in the same names.

3d order, "Deliver for Thomas Loud."

The name of Thomas Loud had been inserted in the two first, but was erased, and the names of Brown and Young substituted.

On the 11th of August the plaintiffs made the following return (to the inspector of corn returns) viz.

Sellers.	Buyer.	Price.	Amount.
356 quarters,—J. Wightman, Edwards, Raymond, and Co. W. Downe and S. Hall.	T. Loud.	60s.	1070 <i>l</i> .

under 1st and 2d G. 4, c. 8, s. 12, by which it is enacted, "That every corn-factor shall, and he is hereby required to return, or cause to be returned on the Wednesday in each and every week, to the inspector of corn returns, an account in writing, signed with his own name or the name of his own agent, of the quantities of each respective sort of British corn so by him sold and delivered during the week, with the prices thereof, the amount of every parcel, with the total quantity and value of each sort of corn, and by what measure or weight it was sold, with the names of the buyers thereof, and of the persons for whom such corn shall have been sold by him respectively; in default whereof every such corn-factor shall for every such neglect forfeit and pay the sum of 10*l*."

They afterwards paid the inspector's fee upon the delivery of the quantity returned as sold to Loud, pursuant to the 33d section of the same act, by which it is enacted, "that all British corn that shall be brought into the river Thames eastward of London Bridge, and shall be sold and delivered, shall be charged with the sum of 1*d*. per last, or ten quarters; and that all foreign corn when delivered out of any ship or vessel in the port of London shall be charged with the sum of 2*d*. per last, or ten quarters; and that it shall be lawful for the in-

spector of corn returns for the city of London to demand, collect, and receive the same from every corn-factor or importer of corn respectively, on whose account such British or foreign corn shall be sold and delivered, or shall be delivered out of the ship or vessel in which the same shall have been imported, as the case may be; and that the corn-factor or importer shall deliver a full and true account of the quantity of the said corn to the corn inspector, within one week after the sale and delivery thereof, or the delivery thereof from the ship or vessel, with the name of the commander of such ship or vessel."

One of the defendants on being asked to give the name of the buyer in order to the collection of the metage, said the wheat was Woodley's wheat. It was subsequently landed by the defendants.

Loud having become bankrupt a short time afterwards, while the corn was yet in the defendant's warehouses, the plaintiffs demanded it of them, and upon their refusal to deliver it up, brought this action in trover, upon the trial of which at the London sittings after Michaelmas term last, before BEAR, C. J., a verdict was found for the plaintiffs.

*530] *Wilde*, Serjt., having obtained a rule nisi for a new trial, *Vaughan*, Serjt., was to have shown cause, but the court called on

Wilde to support his rule. He insisted, among other things, that the returns and payment of lackage on the quantity delivered, under 1 & 2 G. 4, c. 87, were conclusive evidence of a delivery, as well as of a sale to Loud, and that, therefore, the property in the corn being vested in his assignees, this action would not lie against the defendants; above all, he contended, that the intention of the legislature in passing this act would be defeated, if the returns did not point out who was a real owner under a transaction of sale; for if the returns were in any respect deceptive, the average upon actual sales, which it was the object of the legislature to arrive at the knowledge of, could never be ascertained, and false bargains would be made with a view to false averages.

BEAR, C. J. The integrity of some neighbouring states, sunk under much less weight of public debt than that which now presses on the industry of this country.

In some of these countries, the land has been discharged of tithes, in all, the maintenance of the poor is left to uncertain supplies of charity. Our farmers having far more than an equal share of tithes, poor rates, and other charges than other persons, cannot compete with the farmers of those countries. All honest men who wish that this kingdom should deserve the blessings it enjoys by keeping faith with its creditors, will support corn laws; and I will go as far as any judge to prevent false returns under 1 & 2 G. 4, c. 87. But we are not *531] deciding whether the return that has been made in this case has subjected the party who made it to the penalty imposed by this statute for making a false return. The question is, whether the plaintiffs having, as corn-factors, returned that this corn was sold and delivered to Loud, they are concluded by that return, and are not now permitted to prove that although the corn was sold to Loud, it was delivered to the defendants, on the condition that they were not to deliver it to Loud, or part with it until he had paid the plaintiffs for it. As long as corn is sold on credit, the vendors, although they part with the possession, will make such conditions as will enable them to resume the possession in case the vendee becomes incapable of paying for it. And I do not think the legislature meant to interfere with the contrivances to which the vendor might think it right to have recourse to secure the payment of the purchase money. All that is wanted to satisfy the words or spirit of the statute is the quantity of corn sold, the persons for whom and to whom it is sold, and the prices. This is all that can be required to ascertain the average price of corn throughout the kingdom.

It is immaterial to whom or under what restrictions any corn when sold was delivered. The 11th section which requires all cornfactors in London, within

one month after the passing of the act, "to declare that he will make returns according to the provisions of this statute," only makes him say that his returns "shall contain the whole quantity and no more of the corn bonâ fide sold and delivered by him, with the prices of such corn, and the names of the buyers, and of the persons for whom such corn was sold." The 12th section, which directs cornfactors to make weekly returns, says, these returns are to contain the quantities of each respective sort of corn sold by him, and delivered during the week, with the prices thereof, the amount of every parcel, with the total quantity, and value of each sort of *corn, and by what measure or weight the same was sold, with the names of the persons for whom such corn shall be sold. [*532 Country dealers who buy corn are by the 18th section directed to make returns of the corn bought by them in similar words. Neither of these sections require that the returns shall state to whom any corn sold was delivered, nor was it material to the purpose of the act that the return should state to whom it was delivered. It would affect the credit of buyers if these returns disclosed the stops which the vendor might think proper to put on the delivery, for securing the price.

This was a delivery of the corn to Loud, when he should have paid for it. I think, therefore now, as I did at the trial, that the return made by the plaintiffs of its having been delivered to Loud, ought not to prevent them from proving that it was delivered to defendants on account of Loud, but that the defendants were not to allow Loud to possess himself of it, or to dispose of it for him, until the plaintiffs were paid the price of it. The rule for a new trial should I think be discharged.

The rest of the Court concurring, the rule was discharged accordingly.

END OF HILARY TERM.

AN
INDEX
TO THE
PRINCIPAL MATTERS.

Mill Currier

The figures refer to the English folios, which will be found in a bracket at the head of the page, and in the margin of the text.

ACTION ON THE CASE.

1. Clerks of commissioners intrusted with the conduct of public works, are not liable in damages for an injury occasioned by the negligence of artificers employed under their authority. *Billington v. Smith and Others.* 156
2. The being delayed four hours by an obstruction in a highway, and thereby being prevented from performing the same journey as many times in a day as if the obstruction had not existed, is a sufficient injury to entitle a party to sue the obstructor. *Greasly v. Codling and Another.* 263
3. *Held*, that a party might recover from the Bank of England the dividends arising on his stock in the funds, though at the time the dividends were payable he knew the stock had some months previously been placed, under a forged power of attorney, to the name of another person; omitted to inform the bank of the circumstance; and did not demand payment of the dividends till after the escape of the offender. 263

Property in stock is not transferred from the owner, by being placed under a forged power of attorney, to the name of another person in the books of the Bank of England. *Davis v. The Bank of England.* 393

AMENDMENT.

See RECOVERY, 1, 2, 3, 4.

Where it is not inconsistent with the justice of the case, the court will, after verdict, amend the record by the insertion of a *similiter*. *Reader v. Bloom.* 383

ANNUITY.

If the person employed by the grantor of an annuity to raise money, and by the grantee to pay the consideration, retain any part of it for a debt due to himself from the grantor, and for the expenses of deeds, the court will set aside the annuity on payment of principal and interest, though the grantee is not privy to the retainer. *Calton v. Porter.* 370

APPOINTMENT.

See POWER, 1.

ARBITRATION.

1. The declaration stated that the plaintiff and defendant, by articles of agreement (reciting

that several actions arising out of the same transaction had been brought, and defended by the plaintiff and defendant, G. A. and D. A., and that in one of them the assignees of one G. T., a bankrupt, recovered against the plaintiff 2500*l.*, and that disputes existed between the plaintiff and defendant respecting the value of the goods and stock which each had received from a certain farm, and their keep and feeding by the plaintiff, and also concerning the proportion which each was to pay of the said sum of 2500*l.*, according to an agreement entered into between them before the trial, and also concerning the costs of bringing and defending the actions above mentioned.) submitted themselves to the award of J. T., J. R., and T. C. respecting the said matters: That the arbitrators, taking the said matters into consideration, awarded the defendant should pay the plaintiff 444*l.*; that five-eighth parts of the costs of the several actions before mentioned should be paid by the plaintiff, and three-eighths by the defendant; that the sums already expended by either of them should be allowed as part payment of his proportion; and that, when the sum of 444*l.* and the costs, including those of the arbitration and award, were paid, mutual releases should be given. On demurrer, held that the plaintiff was entitled to recover: for that as to the first part of the award, nothing appeared on the declaration to show that the arbitrators had not awarded the sum of 444*l.* after taking into consideration the value of the stock and goods; that it was sufficiently certain; and that if the arbitrators had exceeded their authority as to costs, it was not sufficient to invalidate the award. *Aitchison v. Cargrey.* 199

2. The court cannot interfere to alter the terms of an award, in order to make them consist with the submission, even where the submission to arbitration gives minute directions for the course to be pursued by the arbitrator. *Hall v. Alderson and Another.* 476

ASSUMPSIT.

See EVIDENCE, 5. SHIP OWNER.

1. O. had been in the habit of shipping goods at Newry, consigned to A. at Liverpool, to be sold on O.'s account, and of thereupon

drawing bills of exchange upon A., frequently, in anticipation of future consignments. On the 5th of January, 1819, there was due to A. a balance of 1659*l.* arising out of these transactions. On the 6th, O. shipped on board a ship of C.'s goods for Liverpool to the amount of 592*l.*; consigned them to A., sending him the bill of lading and invoice; and at the same time drew on him a bill for 500*l.* A. having refused to accept the bill, O. indemnified C., who thereupon landed the goods at Newry, and re-delivered them to O.: *Held*, that A. might sue C. in *assumpsit* for the non-delivery of the goods. *Anderson v. Clark.* 20

2. Three executors ordered goods to be sold as the goods of their testator. They afterwards sued for the amount, without styling themselves executors, and without joining a fourth executor, who was named in the will: *Held*, that they might recover. *Brassington and Others v. Asst.* 177

3. Twenty parishioners joined at a vestry in signing an order for the repairs of the church, and one of them, a churchwarden, paid the artificers, but the rate for reimbursing him was quashed: *Held*, that he could not sue for contribution the persons who signed the order. *Lancaster v. Frewer.* 361

ATTORNEY.

Striking off the rolls. *Garbutt, in the Matter of.* 74

AUTHORITY.

The plaintiff gave the following order on the defendants, his bankers: "I request you to hold me 400*l.* from my private account, to the disposal of J. Mintern and Co."

The order was presented to the bankers, who had also an account with Mintern and Co.; but Mintern and Co. not requiring the money, it was not paid to them, or passed to their account. The plaintiff revoked the order before it was paid, or carried to Mintern's account; notwithstanding which revocation, the defendants afterwards paid the money to Mintern and Co. A jury having found for the plaintiff, after a direction to consider whether the order was absolute or conditional, the court refused to grant a new trial. *Gibson v. Minet and Others.* 7

AVOWRY.

See PLEADING, 2.

Avowry, "that for all the time during which the rent was accruing due, and from thence until and at the time when, &c., and until and at the death of T. F., the plaintiff held the place in which, &c., as tenant to T. F. in the lifetime of T. F. under a demise, and because two years' rent due from the plaintiff to T. F. in his lifetime remained unpaid, and because the plaintiff remained in possession of the place in which, from the death of T. F. till the time when, &c., the avowants, as executors of T. F., distrained:" *Held*, sufficient on demurrer. *Staniford v. Sinclair and Others.* 193

BAIL.

A cause commenced in the Common Pleas was removed by error into the King's Bench,

where judgment was affirmed against the defendant, who then brought error to the House of Lords. The defendant, while the cause was in the King's Bench, having surrendered himself to the prison of that court: *Held*, that the bail might, notwithstanding, while the appeal was yet pending in the House of Lords, enter up an *exoneretur* upon the recognisance of bail remaining in the Court of Common Pleas. *Sherrat v. Flyer.* 18

BAIL BOND.

See PRACTICE, 6.

BANKRUPT.

See EVIDENCE, 4.

The bankrupt was in the possession of property as apparent owner, under an instrument, which, though in appearance a lease, was, in effect, a contrivance to secure the seller of the property, the price to be paid, together with 10 *per cent.* interest on the amount until it should be paid:

Held, that the bankrupt's having obtained the apparent ownership by means of this fraud, would not prevent the assignees from recovering under the statute of James First. *Sinclair and Another v. Stevenson.* 514

BANKRUPTCY.

1. A commission of bankrupt having been sued out against defendant, in custody under a *ca. sa.*, the plaintiff, in order to prove his debt, discharged defendant from the execution. The commission having afterwards been superseded, plaintiff took defendant in execution again. The court, from various affidavits, suspecting that the commission and supersedeas had been fraudulently concerted, refused to discharge the defendant on motion.

2. In questions of great amount, the court will not decide between contradictory affidavits, but will order the contested fact to be ascertained by a jury. *Baker and Others v. Ridgway.* 41

2. A statement in a deposition before the commissioners of bankrupts, that a party promised to meet one of his creditors at a given place, and failed to do so, is not sufficient evidence to establish an act of bankruptcy under 49 G. 3, c. 121, s. 10. *Tucker and Another v. Jones.* 2

3. Goods which, with the consent of the true owner, come to the possession of a party after he becomes a bankrupt, do not vest in the assignees under 21 Jac. 1, c. 19, s. 11, and he becomes a bankrupt on committing the act of bankruptcy, which is followed up by a commission.

A party who purchases goods under a distress irregularly conducted, has a sufficient title to maintain trover. *Lyon v. Weldon and Others.* 334

BARON AND FEME.

The husband cannot sue for arrears of rent accruing after the death of his wife, on a lease of her land by himself and wife under seal during coverture, in which the lessee covenanted with the husband and wife and the heirs of the wife.

2. If the lease be made according to stat. 32 H. 8, c. 28, it continues during the term,

notwithstanding the death of the wife; and though her heir is entitled to the rent, he cannot enter or eject. *Hill v. Saunders*. 112

BOND.

See RENT CHARGE.

A bond, after reciting the appointment of J. B., by churchwardens and overseers, as a collector of church and poor's rates, was conditioned for the duly accounting to the obligees and their successors for money received pursuant to and in execution of the office of collector: *Held*, that the obligors were not responsible for receipts on account of any year subsequent to that during which the obligees were in office. *Leadly and Others v. Evans*. 32

CONDITION.

See COVENANT, 1. RENT CHARGE.

CONVICTION.

See HACKNEY COACHES.

COPYHOLD.

1. There may be concurrent customs in a manor court to bar copyhold entails, by surrender and by recovery. *Walkhead v. Ossingbrooke*. 70
2. A copyhold property, which, when in the hands of a single owner, pays but one heriot, but pays several if divided among several owners, shall again pay but one heriot, if it again becomes united in the person of a single owner. *Garland v. Jekyll and Another*. 273

COSTS.

See REPLEVIN.

1. *Holmes v. Holmes*. 75
2. Under the Birmingham paving act, 52 G. 3, c. 113, some of several defendants, in whose favour a verdict has been given, are entitled to treble costs, though the verdict may have gone against others. *Hall v. Smith and Others*. 267
3. In an action for assault and battery, with a separate count for false imprisonment, where the verdict was for 1s. damages, and the judge certified under 43 Elis., c. 6, the court refused to tax the plaintiff his costs. *Briggs v. Bowgin and Another*. 333
4. Costs allowed on an interlocutory proceeding in a writ of entry. *Denman v. Bull*. 386
5. Where, after a verdict for a sum of money, two questions were raised for the opinion of the court, on a special case, and one of them at the time of argument was withdrawn by mutual consent: *Held*, that the plaintiff, retaining his verdict for the sum of money, was entitled to the costs of the special case, though the defendant succeeded on the point that was argued. *Garland v. Jekyll and Another*. 330

COURT OF CONSCIENCE.

See FALSE JUDGMENT.

COVENANT.

See BARON AND FEME.

1. In an agreement to let, in which there was no clause of re-entry, the following stipu-

lation was held to be a covenant, and not a condition operating in defeasance of estate:

"It is also hereby agreed and clearly understood, that in case the said A. W., or his heirs, executors, and assigns, should want any part of the said land to build, or otherwise cause to be built, then the said T. R., or his heirs, executors, or assigns, shall and will give up that part or parts of the said land as shall be requested by the said A. W., by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence, at a fair valuation, as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends to do."

Wilson and Others v. Phillips. 13

2. Defendant, as jailer, covenanted with the sheriff, among other things, to attend the quarter sessions, and to remove prisoners, under writs of *habeas corpus*, without permitting them to escape.

The defendant being engaged at the quarter sessions, the sheriff, upon a writ of *habeas corpus* for the removal of a prisoner, directed his warrant to the defendant, and "W. W., by me, (the sheriff,) for this time only, thereto specially appointed."

W. W., who was the defendant's turnkey, proceeded with the prisoner towards the place of destination.

The prisoner having escaped; *Held*, that the sheriff, having specially directed the warrant to W. W., the defendant was not liable upon this covenant. *Ryland v. Lumsden and Others*. 65

CUSTOM.

See COPYHOLD, 1.

DEED.

See FORGERY.

DEVISE.

1. Devise to A. for life, remainder to all her children that should be living at her death, equally amongst them, if more than one, to be divided share and share alike, when as they should respectively attain the age of twenty-four, and to their respective heirs, to take as tenants in common, and not as joint-tenants:

Held, that A.'s children (seven in number) took a vested interest at her death, as tenants in common. *Farmer and Others v. Francis and Others*. 151

2. Devise of an estate to trustees in trust to permit devisor's six children, A., B., C., D., E., F., (B. being a daughter, and the others sons,) to receive a sixth part each of the rents during their life and lives, and after their respective deceases, to permit the child or children of the child so dying to receive the rents of the share of the child so dying, in equal shares and proportions; and so on in like manner from children to children: In case either of devisor's children should die without leaving issue, the rents of the child so dying to go to the survivor or survivors.

A., C., E., and F. died without issue, and B. leaving a son and two daughters:

Held, that the devisor's children took

estates tail; that upon the death of A., C., E., and F., their shares accrued to D., as survivor, and that B.'s son was only entitled to one-sixth. *Wollen v. Andrews.* 126

DISCONTINUANCE.

An agreement to discontinue an indictment (even supposing such an agreement to be legal.) can only be effected by the attorney-general's entering up a *nolle prosequi*. *Elworthy v. Bird.* 258

DISCLAIMER.

See LANDLORD AND TENANT, 1.

EJECTMENT.

In 1813, the commissioners for the enclosure of a parish, the tithes of which were vested in several lay impropriators, appointed meetings for receiving claims, and various claims were put in, but none in respect of tithes, within the time limited by the general enclosure act; notwithstanding this, the commissioners, in 1817, made J. an allotment in respect of the impropriate tithes of certain land occupied by him, which tithes, as well as the land, J. claimed under the will of P.: in 1820, W., who claimed these tithes under the heir of P., on the ground that they did not pass by P.'s will, brought an ejectment for the allotment made in respect of them: *Held*, that having omitted to make his claim before the commissioners within the time limited by the act, he could not recover. *Doe dem. Watson v. Jefferson.* 118

ENCLOSURE.

See EJECTMENT.

ERROR.

1. If one of many defendants, who have severally in defence, sues out a writ of error, the plaintiff cannot proceed to execution, because one of the other defendants makes an admission that the writ was sued out for delay. *Aarons v. Williams, Searle, and Cann.* 304
2. Where a plaintiff brought a writ of error on a nonsuit, the court refused to stay execution, at least, unless some real error were pointed out. *Evans v. Swete.* 326

ESCAPE.

See COVENANT, 3.

ESTATE TAIL.

Settlement to the use of J. G. for life, remainder to the use of the first son of the body of J. G. by A. S., his intended wife; and for default of such issue, to the use of the second, third, and other sons of the body of J. G. by A. S., severally and successively as they shall be in seniority of age, and of the several heirs male of their several bodies; and for default of such issue, then in case A. S. should be enceinte by J. G., to the use of J. P. till A. S. should be delivered, in trust for after-born child or children; and in case such should be a son or sons, to the use of such after-born son and sons severally and successively as they should be in priority of birth, and the heirs male of the body and bodies of such after-born son and sons:

Held, that the first son of J. G. by A. S.,

born during his life, took an estate tail. *Gally v. Barrington and Others.* 386

EVIDENCE.

See BANKRUPTCY, 2. PRACTICE, 1.

1. In an action against Y. for the price of goods sold: *Held*, that F. was not a competent witness to prove that the goods had been sold to Y. and F. jointly, and that they had been paid for by remitting a debt due from the vendor to the firm of Y. and F. *Beans v. Yeatherd.* 133
2. Declarations of servants and intimate acquaintances are not admissible evidence in questions of pedigree. *Johnson v. Lawson and Another.* 86
3. By an adjudication of the quarter sessions under an enclosure act for the parish of T., the *locus in quo*, parcel of a large waste, was found to be in the parish of G., in which K. had a manor: Over the *locus in quo*, B., who had a manor in the adjoining parish of T., had immemorably exercised acts of ownership: K. had also exercised acts of ownership over it occasionally, but they were less decisive than those exercised by B.: In the act of parliament for the enclosure of T., there was an enumeration of B.'s claims in respect of property in T., but no mention of G., nor any claim by B. in respect of property in G.

In an action of replevin, in which there was conflicting evidence as to the boundary of B.'s manor, the judge left it to the jury to say whether the soil of the *locus in quo* was in K. or B., without calling their attention to the question, whether or not the parishes and manors were conterminous: the jury found in favour of K.: *Held*, that the judge had left the case properly to the jury, and that the circumstance of there being in the enclosure act for T. no mention of B.'s having any claim in respect of property in the adjoining parish of G. was sufficient to warrant the jury in the inference that B.'s manor did not extend beyond T. *Lester v. Kemp.* 30

4. On the 3d of July, W., who had appointed to meet L. respecting some accounts in which W. was interested, broke his appointment, and departed for France, leaving for L. a letter, in which he said, "I shall be back, I hope, in ten days; in the mean time I shall make proposals to your son's creditors.—I will write to B. and S., so do not feel uneasy about them, or any of your son's friends."

On the next day, he wrote to L. a letter from Calais, in which he said, "If you could accompany my brother, you would contribute to get the business settled a moment the sooner;" and on the 2d of August he wrote from Paris, saying, "As some of B. L.'s (L.'s son's) creditors have threatened to make me solely responsible, I am under the necessity of remaining in France."

Held, that these letters were admissible in evidence, and sufficient to establish an act of bankruptcy, by showing with what intention W. departed the realm. *Rawson and Another v. Haigh and Others.* 99

5. The defendant having purchased twelve-sixteenths of the East India ship M., commanded by the plaintiff, and chartered by the company for four voyages, proposed to the plaintiff, and the plaintiff consented, to

resign the command in favour of the defendant's nephew, upon receiving in exchange the command of another ship, E., then chartered for one voyage. If the company acceded to the exchange, it was agreed, that in case the nephew died or resigned before the expiration of the four voyages, the plaintiff should succeed him: as a further inducement to the plaintiff to resign the command of the M., the defendant undertook to procure a beneficial alteration in the destination of the E., and the person who negotiated the affair on the part of the plaintiff, undertook (as he asserted, without the plaintiff's knowledge) to pay the defendant 2000*l.*, if the plaintiff should refuse to resign. The exchange was approved of by the company, and the destination of E. altered. The plaintiff and the nephew sailed on their respective voyages. The plaintiff became bankrupt on his return from his voyage in the E., and the nephew died in the course of his second voyage in the M. The defendant having refused to appoint the plaintiff to succeed him, was sued in *assumpsit* for breach of agreement, and the value of a voyage having been proved to vary from 4000*l.* to 8000*l.*, the jury gave 7500*l.* damages. On motion for a new trial, and in arrest of judgment: *Held*.

First, That after verdict there was a sufficient consideration for the defendant's agreement.

Secondly, That the agreement was not illegal.

Thirdly, That books containing lists of passengers, deposited at the India House, pursuant to the 53 G. 3, c. 155, were admissible in evidence towards showing the value of a voyage.

Fourthly, That the jury might give damages for the loss of the two remaining voyages, though the second had not been accomplished at the time of the action. *Richardson v. Mellish*. 229

6. Under the general issue in *assumpsit*, a judgment recovered for the same cause of action may be given in evidence. The payment of money into court on several general counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only. *Stafford and Another v. Clark*. 377

7. Declarations of one who has been holder of a bill of exchange cannot be received in evidence, unless they were made while the party had possession of the bill. *Pocock v. Billing*. 269

8. Returns of sales of corn made under 1 & 2 G. 4, c. 87, are not conclusive evidence to show the parties to whom the corn was delivered. *Woody and Another v. Brown and Another*. 527

EXECUTION.

See BANKRUPT, 1. PRACTICE, 3. ERROR, 2.

FALSE JUDGMENT.

A writ of false judgment does not lie from the Southwark Court of Requests to a court of common law. *Scott v. Bye*. 344

FINE.

See RECOVERY, 2, 3.

FORGERY.

A power of attorney for the transfer of government stock is a deed within the meaning of 2 G. 2, c. 25; and a conviction under that statute for the forgery of such a power was holden sufficient. *The King v. Fauslane-roy* 413

HACKNEY COACHES.

The 9 Ann., c. 23, s. 4, inflicts a penalty on any person who shall drive or let to hire any *hackney* coach or coach horses in the cities of London or Westminster without a license from the commissioners of hackney coaches.

The 1 G. 1, c. 57, s. 1, inflicts a penalty on any person who shall drive for hire in the same cities with any coach whatsoever, *harse* or coach horses, except such person be licensed by the commissioners of hackney coaches:

Held, that a conviction was insufficient, which charged the party with driving and letting to hire in the said cities a certain coach and two coach horses, and also with driving to hire a certain coach and two coach horses, and conveying a person in the said coach for hire. *Cloud v. Turfery and Abbott*. 318

HERIOT.

See COPYHOLD, 2.

INFERIOR COURT.

See PLEADING, 9.

INSOLVENT DEBTORS.

Under the insolvent debtors' act, 1 G. 4, c. 119, by the assignment at the time of petition, the assignee takes only such property as the insolvent had at the time of the petition. *Hepper v. Marshall and Others*. 372

INSURANCE.

1. Insurance on goods in a ship warranted free from capture and seizure.

The ship was stranded on a shoal within a few miles of the port of destination, disabled from proceeding, and lost; but while she lay in the sand she was seized by the commander of the place at which she was stranded, and the goods were confiscated by him:

Held, a loss of the goods by the perils of the seas. *Hahn v. Corbett*. 205

2. K., an East India captain, having borrowed money of R., in order to secure K., arranged with P. that K. should draw in favour of R. bills on C., (P.'s agent in Calcutta,) payable at thirty days after the arrival of the ship B., which bills R. was to endorse to P., and P. was to negotiate on Calcutta upon K.'s consigning to C. goods to double the amount of the bill: *Held*, first, that P. had no insurable interest in these bills. Secondly, that even supposing he had, he could not recover upon a policy describing them as bills of exchange. *Palmer and Others v. Pratt*. 185

JAILER.

See COVENANT, 3.

JOINER.

See ASSUMPSIT, 2.

JUSTICE OF PEACE.

1. Where a statute gives a justice jurisdiction over an offence, it impliedly gives him power to apprehend any person charged with such offence: *Held*, therefore, that a magistrate might issue a warrant to apprehend a person charged with an offence under the malicious trespass act, 1 G. 4, c. 56, especially after the offender had neglected a summons. *Base v. Methuen and Others*. 63
2. If a warrant of commitment does not show an offence over which the magistrate who issued it has jurisdiction, an action lies against him for the commitment, although there might have been a previous regular conviction. A direction to the jury, partially incorrect, is not a ground for a new trial, where the verdict is consistent with the justice of the case. *Wicks v. Clutterbuck*. 483

LANDLORD AND TENANT.

1. Plea to an avowry of distress for rent arrears, "that before the lessor (who claimed title under a pretended agreement between him and one T. R.) had any thing in the premises, and before the demise by the lessor to the lessee, T. R. mortgaged them in fee to J. C.; that the mortgage being forfeited, notice of the forfeiture being given to the lessee, and the lessee having been required to attorn, and having attorned to the mortgagee, he distrained for the rent, when the lessee paid him, to save the goods from being sold;" *Held ill*. *Alchorne v. Gomme*. 54
2. In 1796, H. demised to S. for sixty-eight years, premises which in 1793 had been mortgaged to F. S. assigned to N., who underlet to D. In 1818, H. conveyed the premises in fee to R. N., who was also agent of H., paid the interest on the mortgage to F. from 1816 to 1820, to the amount of the rent reserved. R. distrained for rent in 1820: *Held*, that D., who relieved at the instigation of N., might, under the plea of riens in arier, avail himself of these payments. *Dyer v. Bosley*. 54
3. Payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knows the precise nature of the adverse claim, or the manner in which the lessor's title has expired. *Fenner v. Duplock and Another*. 10

LIEN.

Defendant, who had a lien on some cloth, purchased it of the bailor after he became bankrupt, and, when the cloth was demanded of him by the assignees of the bankrupt, refused to give it up, saying, "I may as well give up every transaction of my life:" *Held*, that these words were no waiver of his lien, and that the lien was not merged in the purchase. *White and Another v. Gainer*. 23

MEMORANDA.

1, 164, 165.

PARTNERSHIP.

Plaintiff and defendant had been engaged in running a coach from B. to L. Plaintiff finding horses for one part of the road, defendant for another; and the profits of each party were calculated according to the number of miles covered by his own horses. The plaintiff received the fares, and rendered an account thereof to the defendant every week:

Held, that plaintiff and defendant were partners in this concern, and that in an action by the plaintiff against the defendant upon a separate transaction, the defendant could not set off a balance which had been declared in his favour upon these weekly accounts. *Fro-mont v. Coupland*. 170

PAYMENT.

In the condition of a bond it was recited, that plaintiffs were shareholders in the Spring Water Company,—that 30 per cent. had been paid by instalments upon the shares,—that plaintiffs had agreed to pay up the remaining instalments forthwith,—that M., W., and H. had agreed to purchase these shares, and that the price was to be secured by the joint bond of M. and the defendant: the condition of the bond was, that M. and the defendants should pay the plaintiffs the amount of the shares, together with the interest thereon from the time of the *advance or payment thereof* by the plaintiffs.

The plaintiffs being also shareholders and treasurers of the Stone Pipe Company, which company was indebted to them 12,000l., prevailed on the Spring Water Company to purchase the pipes of the Stone Pipe Company; and to effect payment for the pipes, the plaintiffs, without any calls having been made, entered up in their books as paid, the remaining 70 per cent. due on the Spring Water Company's shares, and having made this entry, paid the Stone Pipe Company; deducting, and transferring to their own account, enough to discharge the debts due from the Stone Pipe Company to themselves.

In an action brought against the defendant for the sum claimed in respect of the sale of the shares of the Spring Water Company, the jury having found for the plaintiffs, the court refused to grant a new trial, holding, that the plaintiffs had advanced or paid the money for the shares, within the terms of the condition of the bond. *Everett and Others v. Eyre*. 166

PILOT ACT.

Under the provisions of 52 G. 3. c. 39, the master of a vessel, who discharged a cinque port pilot in Standgate Creek, and dropped a mile down the port of Rochester with a signal flying for a Trinity-house pilot, who came on board at Sheerness, was holden liable to a penalty. *Thornton v. Balland*. 319

PLEADING.

See LANDLORD AND TENANT, 2.

1. In trespass, the plaintiff newly assigned that his close, the *locus in quo*, abutted on certain closes called B., M., and S., some or one of them: defendant pleaded, that the close newly assigned was his; and issue was joined.

The plaintiff proved at the trial that he had a close abutting on M.; the defendant, that he had a close abutting on B. and S.

The jury found a verdict for the plaintiff on the new assignment.

The court refused to disturb the verdict, to enter a discharge of the jury, or to arrest the judgment,—which was moved for on the ground that the pleadings were not sufficiently certain, and that the defendant had established his own issue. *Letchbridge v. Winter.* 49

2. *Avowries*, first by W. and T. for rent due to W. and T. from plaintiff, as tenant to W. and T.; secondly, as tenant of the premises; and, thirdly, by W. and T. and his wife, in right of his wife, for rent due to W. and T. and his wife, in right of his wife from the plaintiff, as tenant to W. and T. and his wife, in right of his wife; were holden to be supported by evidence of an attornment from plaintiff to W. and T. and his wife. *Gravesner v. Woodhouse and Others.* 71

3. The defendant, who had contracted for jewellery, was to return it in a twelvemonth, and if he omitted to do so, to pay for it a certain price, with interest.

The plaintiff sued for the amount, the jewellery having been retained; but the only counts in the declaration applicable to his case were a count for goods sold and delivered, and a count for interest on money due and forborne.

The jury having found a verdict for the sum demanded, with interest, the court refused to set aside the verdict, or to reduce the damages. *Harrison v. Allen and Others.* 4

4. Plea to declaration in trespass, that they under whom defendant claimed, enjoyed, under a grant to pass through a close as they had been theretofore accustomed to do, a way for themselves and their servants, and with horses, and that defendant therefore entered by himself, and his servants, and with horses:

New assignment, that the defendant had used the way for purposes other than those for which they under whom he claimed were accustomed to use it, to wit, with horses carrying bricks.

Plea to new assignment, that they under whom defendant claimed had a just right to use, and used, the way, by themselves and with horses, for all lawful purposes, and that defendant had therefore used the way with horses carrying bricks, being a lawful purpose.

Replication, that they under whom defendant claimed did not use the way with horses carrying bricks: *Held*, ill on demurrer. *Trickey v. Yeandall.* 26

5. Where there were counts in the same declaration for work and labour as an attorney, and for work and labour generally, the court refused to strike any out as unnecessary. *Brindley v. Donnett.* 184

6. A letter containing the terms of a contract between the plaintiff and defendant, concluded in these terms—"Of this proposition, it is desirable that I have your answer per return, as I can have a vessel to charter at the price stated, who will not wait any longer for my answer, and failing him, I fear I should not be able to get another."

Held, a mere request, and no part of the contract. *Johnson and Another v. King.* 270

7. Nine counts on the following words, and the colloquium in which they occurred: "Nelson's failed lately, and only paid ten shillings in the pound."

The court refused to strike out any as unnecessary. *Nelson v. Griffiths.* 412

8. Upon a *sci. fa.* on a judgment, the defendant having moved to plead several matters, viz. first, payment; secondly, that the judgment was fraudulent; thirdly, that the judgment was on a warrant of attorney fraudulently obtained: The court refused to allow the three pleas, and put the defendant to his election. *Shaw and Others v. Lord Alvanley.* 325

9. Plea to a declaration in assumpsit,—that the plaintiff had sued in an inferior court, in which judgment had been given against him, for the same cause of action; (not stating that the consideration arose within the jurisdiction of the inferior court;)

Replication, that plaintiff and defendant both resided out of the jurisdiction, and that the cause of action arose out of the jurisdiction: *Held* sufficient on demurrer. *Briscoe v. Stephens.* 213

10. The defendant purchased an estate charged with an annuity to M. S., and, as part of the bargain, covenanted to pay the annuity, and to indemnify the vendor against any charge in respect of it.

Breach, in a declaration on this covenant, non-payment of the annuity;—without adding that the vendor had been thereby damaged: *Held*, sufficient on demurrer. *Seward v. Ansty.* 519

11. Trespass for false imprisonment. Plea, that a horse of A's having been taken out of A's close without his consent, and having been found in plaintiff's stable, and A. having grounds to believe, and believing that the horse had been stolen by plaintiff, gave charge of the plaintiff to a constable, and requested him to take the plaintiff into custody, to be examined by a justice touching the offence; whereupon the constable, and A., in his aid and by his command, laid their hands on the plaintiff, who resisted, and assaulted the constable and A., whereupon they defended themselves, and took the plaintiff and conducted him to a police office: *Held*, ill. *Hedges v. Chapman and Cousins.* 522

12. Where defendant, and L. D. (who was tenant for life of an estate, with remainders over in tail to the first and other sons of L. D. and of defendant,) conveyed an estate in fee, and covenanted that the first son of L. D. who should come of age, or such other person as should become competent to complete a title to the premises, should, upon the request of the purchaser or his heirs, by recovery, fine, or other assurance as counsel should advise, effectually convey the premises to plaintiff; the purchaser

having died, and his heir having requested defendant to cause his eldest son, then of age, to suffer a recovery, and the defendant having refused, and these facts being alleged in the declaration :

Held, that it was not necessary, in a declaration on this covenant by the heir of the purchaser, to allege that the defendant had notice of such heir having become entitled to the property; nor that counsel had advised a recovery to be suffered; nor that plaintiff had offered to make a tenant to the *præcipe*.
Blicks v. Dymoke. 105

POWER.

1. Devise to S. G. for life, remainder to N. G., son of S. G., and his heirs; but if N. G. should die in the lifetime of S. G. without issue, and there be no other issue of S. G., then to the use of such persons as S. G. should appoint. S. G. and N. G. appointed and conveyed in fee to F.: *Held*, a valid conveyance. *Dalby and Others v. Pullen and Others*. 144
2. A devisor being seized of a moiety of certain lands in Surrey, having by her own creation a power of appointment over the other moiety, which she had purchased of her nephew, who succeeded her sister in the possession of it, and having no other real estate, devised all her freehold estate in Surrey to J. R., on condition that out of the rents and profits he should keep the whole in tenantable repair, and under limitations framed to keep the property as long in her family as possible;

Held, that this devise was, under the circumstances, a sufficient execution of the power, and that both moieties passed to J. R. *Dec dem. Nowell v. Roake and Others*. 497

PRACTICE.

1. An averment that Y. and R. became bail at the request of the sheriff, is satisfied by evidence that they became bail at the request of the sheriff's officer.
The sheriff may put in bail before the return of the writ. *Evans v. Swete*. 271
2. Warrant of attorney. Entering up judgment against a defendant out of the county. *Pemberton v. Browning*. 204
3. *Seemle*, that under 43 G. 3, c. 46, expenses of execution include expenses of levying.
There is no statute of 29 Eliz. *Rumsey v. Tufnell*. 255
4. Where the rule to bring in the body, served on the 5th of July, expired on the second day of Michaelmas term: *Held*, that the sheriff was not discharged by the plaintiff's having, on the 7th of July preceding, and previously to the justification of bail, consented to an order to stay proceedings on payment of debt and costs within a month. *Dissentientibus Park and Burroughs, Js. The King v. The late Sheriff of Middlesex*. 366
5. In a country cause in C. B., the plaintiff is not bound to proceed to trial at the next assizes after the term in which issue is joined. *Prenette v. Blott*. 360
6. Where a sheriff had taken a bail-bond executed by only one security, the court refused to set aside, even on payment of costs, an attachment which had issued against him for not bringing in the body.

Loss of a trial in term is loss of the term.
The King v. The Sheriff of London. 227

RECOVERY.

1. What evidence sufficient to justify the alteration of a parish in a recovery, where a wrong parish was inserted in the deed to lead the uses. 93
2. Amendment. *Floyd, Demandant; Simmons, Tenant*. 386
3. *Thistlethwaite, Demandant; Maidment, Tenant*. 361
4. Where the dedimus described the vouches as a commoner, and the acknowledgment was signed as if by a peer, the court refused to allow the tenant's appearance to be recorded. *Tatton, Demandant; Grey, Vouches*. 313

RENT CHARGE.

A rent charge is within the meaning of the 11 G. 2, c. 19, s. 23; upon a replevin, therefore, of a distress for such a rent, the sheriff may take and assign a bond as in a replevin for any other kind of rent:

Held, that a bond so taken by the sheriff, and conditioned for appearance at the next county court; prosecuting the plaint with effect; making a return if adjudged; and indemnifying the sheriff from all charges and damages by reason of the replevin, was authorized by the above statute. *Short v. Hubbard and Others*. 350

REPLEVIN.

Defendants in replevin, who avowed generally under 11 G. 2, c. 19, for rent due on a demise, under which the plaintiff held as their tenant, were held entitled to double costs upon a judgment in their favour, notwithstanding they pleaded many other avowries in various rights, from which circumstance it was suggested that they did not distrain as landlords, but with a view merely to try a title.

Expenses of successful searches for pedigree are allowed for by the prothonotary in taxing costs. *Johnson v. Lawson and Another*. 341

REPLEVIN BOND.

See RENT CHARGE.

REVOCATION.

See AUTHORITY, 1. WILL, 1.

RIGHT OF WAY.

See PLEADING, 4.

A way of necessity is limited by the necessity which created it, and ceases, if at any subsequent period the party entitled to it can approach the place to which it led, by passing over his own land. *Holmes v. Goring; Holmes v. Elliot*. 76

RULES OF COURT.

Fleet Prison, in the matter of. 164

SET-OFF.

See PARTNERSHIP.

SEVERAL MATTERS.

See PLEADING, 8.

SHERIFF.

1. In an action on the case against the sheriff for not arresting J. W., against whom a writ had issued, it appeared that J. W. was in custody the day after the return of the writ, and that the plaintiff had sustained no damage: *Held*, that the jury were properly directed to consider "whether J. W. could have been arrested before the return of the writ; and if he could, what damage had been sustained by the plaintiff." *Barker v. Green.* 317
2. The plaintiff's attorney, upon issuing execution, wrote to the sheriff's officer, directing him to leave the defendant's mother, or any one else, in possession of the defendant's goods, and to allow his business to be carried on as usual.
The officer delivered the warrant to defendant's shopman, ordering him to carry on the business, and account for the moneys received. No money was ever paid to the plaintiff, and the warrant lay in the shopman's hands from April to June.
The defendant having then become bankrupt, and his assignees claiming his goods, the sheriff returned *nulla bona* to the plaintiff's writ.
The jury having found a verdict for the sheriff in an action against him for a false return, the court refused to grant a new trial. *Doker v. Hasler.* 479

SHIP OWNER.

A party who takes a share in a ship under a conveyance void for want of conformity with the provisions of the registry acts, is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as owner. *Harrington v. Fry.* 179

STATUTE OF LIMITATIONS.

An acknowledgment within six years by one of the joint makers of a promissory note, will revive the debt against the other, although he has made no acknowledgment, and only signed the note as a surety. *Perham v. Reynal and Others.* 306

TROVER.

1. K., the owner of furniture, lent it to plaintiff under the terms of a written agreement; plaintiff placed it in a house occupied by the wife of C., a bankrupt. C's assignees having seized the furniture: *Held*, that plaintiff might recover it in trover, without producing the agreement. *Barton v. Hughes and Others.* 173
2. H. shipped goods at Dundee to the order of, and for P. in London. H. having ascertained shortly after the goods had been for-

warded that P. had stopped payment, endorsed and forwarded the bill of lading to plaintiff, who demanded the goods of defendants, wharfingers, in whose custody they were.

- Defendants having refused to deliver the goods to plaintiff: *Held*, that he had a sufficient title to sue for them in trover. *Morrison v. Gray and Another.* 260
3. The plaintiff sued in trover to recover damages for the detention of papers, which he had deposited with the defendant in furtherance of a fraudulent purpose, and the jury having found a verdict for the defendant, the court refused to grant a new trial.

It is illegal to raise loans for subjects in arms against a government in amity with the government of this country. *De Wüts v. Hendricks.* 314

VESTRYMAN.

See ASSUMPSIT, 3.

WAIVER.

See LIEN.

WARRANT OF ATTORNEY.

See PRACTICE, 2.

WARRANTY.

The defendant, after telling the plaintiff that one of two horses he was about to sell had a cold, agreed to deliver both at the end of a fortnight sound and free from blemish; at the end of the fortnight the horses were delivered, one with a cough, and the other with a swelled leg, a fault that was also apparent at the time of the sale. In an action for the price, a verdict having been found for the defendant, the court refused to grant a new trial. *Liddard v. Kein.* 183

WASTE.

The verdict for the plaintiff in a writ of waste ought to find the place wasted. *Redfern and Others v. Smith.* 262

WILL.

A., by will duly attested, devised all her freehold property to trustees for the use of B.; seven days after executing the will, she conveyed a part of her property to trustees for a charitable foundation, pursuant to 9 G. 2, c. 36; nine days after, she made a codicil, attested by three witnesses, to be taken as part of her will, by which codicil she appointed another trustee, and ordered her money out at mortgage to be first applied in payment of her debts. A. died within a twelvemonth after the deed executed pursuant to 9 G. 2, c. 36.

Held, that the deed did not operate as a revocation of the will. *Matthews v. Venables and Others.* 136







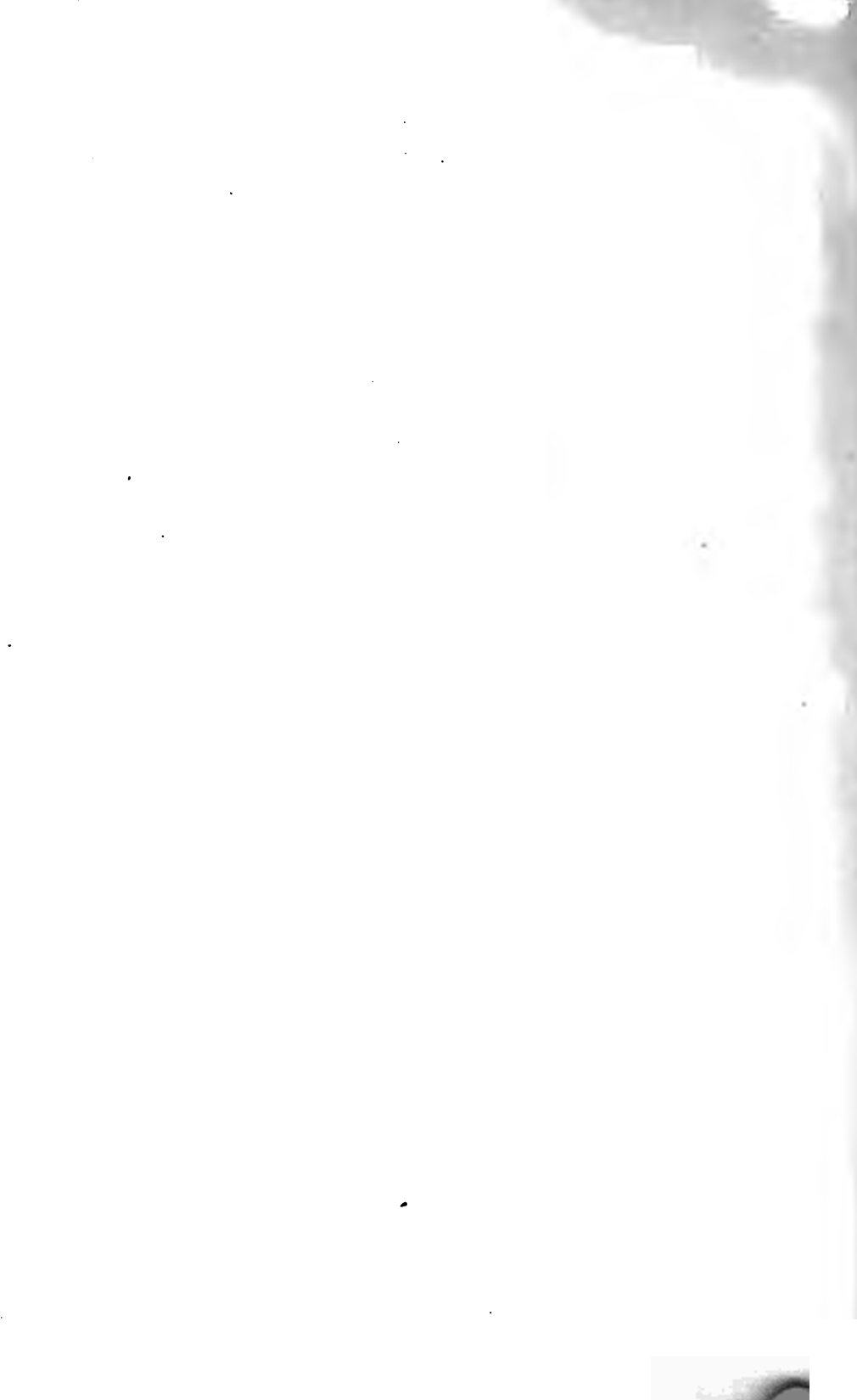
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